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FEDERAL COMMUNICATIONS COMMISSION

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*Reed E. Hundt designated Charman effective November 29, 1993.
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Before the
Federal Communications Commission
Washington, D.C. 20554

ET Docket No. 93-7

In the Matter of

Implementation of Section 17
of the Cable Television
Consumer Protection and
Competition Act of 1992

Compatibility Between
Cable Systems and Consumer
Electronics Equipment

FIRST REPORT AND ORDER

Adopted: April 4, 1994; Released: May 4, 1994

By the Commission:

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INTRODUCTION

1. By this action, the Commission is taking the first steps towards ensuring enhanced compatibility between consumer electronics equipment and cable systems. These regulations implement the statutory requirements set forth by Congress in Section 17 of the Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act), enacted October 5, 1992.[1] The objective of this portion of the 1992 Cable Act is to ensure compatibility between cable systems and consumer TV receivers and video cassette recorders (VCRs), consistent with the need to prevent theft of cable service.

2. The new cable-consumer equipment compatibility regulations include measures that will assure improved compatibility between existing cable system and consumer TV equipment. They also include provisions for achieving more effective compatibility through new cable and consumer equipment. The specific provisions of these regulations are essentially the same as those proposed in the *Notice of Proposed Rule Making* (*Notice*) in this proceeding, with a number of modifications that address issues raised in the record.[2] The new rules for improving compatibility between existing cable system and consumer equipment require that cable operators:

> 1) refrain from scrambling program signals carried on the basic tier of service;
>
> 2) offer subscribers supplemental equipment to enable them to use the special features and functions of their TV equipment with cable service; this includes providing subscribers the option of having simultaneous access to all signals that do not need to be processed by a set-top device;

[1] *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, (1992), §17. This proceeding is limited to issues involved in implementation of Section 17 of the 1992 Cable Act. We have addressed the implementation of other portions of this new legislation in other proceedings.

[2] *Notice of Proposed Rule Making* in ET Docket No. 93-7, 8 FCC Rcd 8495 (1993).

3) provide a consumer education program to inform subscribers of potential compatibility problems and methods for resolving such problems; this includes notice that remote controls and supplemental equipment compatible with the set-top devices used by the cable system are available from third-party vendors; and

4) allow set-top devices that incorporate remote control capability to be operated with subscriber-owned remote controls or otherwise take no action that would prevent the use of such remote controls, including changing the infrared codes used to operate the remote control capabilities of the set-top devices they employ so as to adversely affect the operation of consumer-purchased remote controls.

The compatibility rules for new equipment provide technical standards for "cable ready" consumer TV equipment and require that both "cable ready" consumer TV equipment and cable systems use a standard cable channel plan.

3. We also conclude that more effective compatibility between consumer TV equipment and cable systems that use scrambling can be achieved through use of a standard interface connector, or "Decoder Interface," in "cable ready" consumer TV equipment and associated component descrambler/decoder devices to be provided by cable systems. Used together, the Decoder Interface and component descrambler/decoder devices can eliminate the need for use of a set-top cable box. However, based on indications that the cable and consumer electronics industries are close to agreement on a new Decoder Interface standard that will serve both existing analog cable operations and also incorporate flexibility to support new technologies and services, including digital cable service, we find that it would be appropriate to allow an additional period of time for the industries to complete their work on the new standard. We therefore will not act on the Decoder Interface standard and related issues now, but rather will allow cable operators, consumer electronics manufacturers and other relevant industry parties an additional 90 days to complete the new standard.[3] After that period, we will develop rules establishing a standard for a Decoder Interface connector and requirements for its use.

4. As a policy matter, we also find that standards for cable digital transmissions are desirable. These standards will be needed to ensure that compatibility is maintained as new digital cable technologies and services are introduced. We are not, however, adopting technical standards or other rules in this area at this time, as developmental work on cable digital technologies and services has not reached a stage where it would be reasonable to attempt to specify such regulations. We will continue to monitor progress by the industries in this area and will initiate a separate action on these issues as is necessary to assure continuing compatibility in the future.

5. The actions we are taking today will allow consumers to utilize equipment offered by a variety of suppliers, including the cable system operator, in a competitive market. Thus, a number of manufacturers and retailers will be able to increase their participation in markets to which they previously had limited access. Opening these markets to competitive equipment providers will give product developers and manufacturers, as well as cable system operators, the ability and incentives to introduce new products and to respond to consumer demand. In return, consumers will have greater access to technology with new features and functions. Most importantly, consumers will be assured that the equipment they buy will work with their cable system.

6. Open entry for equipment provision ensures that the equipment market remains competitive. In addition to open markets and incentives for innovation, another key component of competition is information. The new regulations ensure not only that the marketplace will be open and equipment options available to consumers, but that consumers will be informed about their choices. Competition could be stifled unless consumers are informed about their equipment options. By structuring the regulations to promote innovation and competition, we expect increased investment in new technology development and increased economic activity as consumers purchase the new, competitively priced equipment.

BACKGROUND

7. In the 1992 Cable Act, Congress recognized that there are a number of compatibility problems between cable service and consumer electronics equipment. These problems tend to limit or preclude the operation of premium features of consumer equipment and/or to affect the ability of consumer equipment to receive cable programming. For example, the use of set-top cable converter/descrambler devices typically hinders the operation of VCR features such as timed recording of sequential programs on different channels and recording one program while watching another. Set-top boxes also preclude the operation of special features of TV receivers, such as "Picture-in-Picture," that require simultaneous tuning of two channels.[4] In addition, current cable system practices often disallow the use of customer-owned remote control devices, both those that are supplied with receivers and VCRs and universal remote control devices that can control both cable set-top devices and consumer equipment. There also appears to be confusion on the part of consumers about whether, and the extent to which, equipment is "cable ready" or "cable compatible." For example, current TV receivers and VCRs vary in their ability to tune the full range of channels offered by cable systems.

8. *Section 17 Provisions.* Section 17 of the 1992 Cable Act adds a new Section 624A to the Communications Act of 1934, that addresses compatibility between consumer electronics equipment and cable systems.[5] In Section 624A(a), Congress makes the following findings with regard to this matter:

- new and recent models of TV receivers and VCRs often contain premium features and functions that are disabled or inhibited because of cable scrambling, encoding, or encryption and by the use of cable devices, such as converters and remote control units, needed to receive programming;

[3] If the industry parties do not complete their work in the 90-day period, we will establish a standard using our own resources.

[4] A complete discussion of the various compatibility problems is provided in the "Compatibility Report," *infra*.

[5] Section 17 of the 1992 Cable Act, *supra*.

- Consumers will be less likely to purchase, and electronics manufacturers will be less likely to develop, manufacture, or offer for sale, TV receivers and VCRs with new and innovative features and functions, if these problems are allowed to persist: and,

- Cable operators should use technologies that will prevent signal thefts while permitting consumers to benefit from the features and functions contained in such receivers and VCRs.[6]

9. Section 624A(b) specifies that, within one year of the enactment of the legislation, the Commission, in consultation with representatives of the cable and consumer electronics industries, must report to Congress on means of assuring compatibility between TV sets, VCRs and cable systems, consistent with the need to prevent theft of cable service.[7] This section also provides that within 180 days of that report, the Commission shall issue such regulations as are necessary to assure compatibility between consumer electronics equipment and cable systems.[8] Section 624A(b) states that in issuing these rules, the Commission shall consider whether and, if so, under what circumstances to permit cable systems to scramble or encrypt signals or to restrict cable systems in the manner in which they scramble or encrypt signals. However, Section 624A(b) also provides that the Commission shall not limit the use of scrambling technology where it does not interfere with the functions of subscribers' TV receivers or VCRs.[9]

10. Section 624A(c) specifies that, in developing the rules required by Section 624A(b), the Commission is to consider:[10]

- The costs and benefits to consumers of imposing compatibility requirements on cable operators and TV manufacturers in a manner that, while providing effective protection against theft or unauthorized reception of cable service, will minimize interference with, or nullification of, the special functions of subscribers' TV receivers or VCRs, including functions that permit the subscriber to--

  -- watch a program on one channel while simultaneously recording a program on another channel;

  -- record two consecutive programs that appear on different channels; and,

  -- use advanced television picture generation and display features, and;

- The need for cable operators to protect the integrity of the signals transmitted by the cable operator against theft or to protect such signals against unauthorized reception.

11. Section 624A(c) further specifies that the equipment compatibility regulations shall include, as are necessary:[11]

- Technical requirements with which a TV receiver or VCR must comply in order to be sold as "cable compatible" or "cable ready";

- Requirements that cable operators offering channels whose reception requires a converter unit--

  -- notify subscribers that they may not be able to use the special features of their TV receivers and VCRs;

  -- to the extent technically and economically feasible, offer subscribers the option of receiving all other channels directly, without passing through the converter unit;

- Rules to promote the commercial availability, from cable operators and retail vendors that are not affiliated with cable systems, of converter units and remote control devices that are compatible with converter units;

- Requirements that cable operators who offer subscribers the option of renting a remote control unit--

  -- Notify subscribers that they may purchase a remote control from any source that sells such devices;

  -- Specify the types of remote control units that are compatible with the converter unit supplied by the cable operator; and,

- A prohibition that cable operators may not take any action that prevents or in any way disables its converter units from operating with commercially available remote controls.

12. Finally, Section 624A(d) requires the Commission to review periodically and, if necessary, modify the regulations issued pursuant to this section in light of actions taken in response to the regulations and to changes in cable systems, TV receivers, VCRs and related technology.[12]

13. *The Compatibility Report.* On January 14, 1993, the Commission issued a *Notice of Inquiry* (*NOI*) seeking information and comment on the various issues relating to compatibility.[13] The Commission indicated that the information gathered under the *NOI* was to be used in preparing the report to Congress required under Section 17 and in formulating proposals for rules to implement the compatibility regulations required under this portion of the 1992 Cable Act.

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[6] Section 624A(a), Section 17 of the 1992 Cable Act, *supra*.

[7] Section 624A(b)(1), Section 17 of the 1992 Cable Act, *supra*.

[8] Under Part 76 of the Commission's current rules, cable systems are subject to technical standards that specify minimum performance with regard to the quality of NTSC (or similar format) video signals provided at subscriber terminals, 47 C.F.R. §§76.62 and .605; delivery of closed captioning information, 47 C.F.R. §76.606; and signal leakage, 47 C.F.R. §§76.601(e), .605, .609(h) and .610-.617. NTSC is the analog television system currently used in the United States. Portions of the above rules also specify requirements for monitoring and measuring technical performance and resolving any interference resulting from cable system operation. The Commission's rules currently do not address compatibility between cable systems and extended features of subscribers' TV sets, VCRs and related equipment.

[9] Section 624A(b)(2), Section 17 of the 1992 Cable Act, *supra*.

[10] Section 624A(c)(1), Section 17 of the 1992 Cable Act, *supra*.

[11] Section 624A(c)(2), Section 17 of the 1992 Cable Act, *supra*.

[12] *See* Section 624A(d), Section 17 of the 1992 Cable Act, *supra*.

[13] *See Notice of Inquiry*, ET Docket No. 93-7, 8 FCC Rcd 725 (1993).

14. Subsequent to the *NOI*, representatives of the cable television and consumer electronics industries established the "Cable-Consumer Electronics Compatibility Advisory Group" (CAG) to address the various topics in the matter of cable equipment compatibility. This group submitted a number of proposals to address both short term and long term compatibility problems. Under the CAG plan, compatibility problems between cable systems and existing consumer equipment would be addressed through consumer education and supplemental equipment that provides simultaneous access to multiple channels of cable service. A key element of the CAG plan for more substantial long term improvement in compatibility is the implementation of a "Decoder Interface" connector, an updated version of the existing EIA/ANSI "multiport" connector.[14] This feature would be incorporated in "cable ready" TV receivers and VCRs to enable use of component cable descrambler/decoders. The component descrambler/decoders would connect to consumer devices through the Decoder Interface connector and process signals *after* the consumer device's tuner. This would avoid the current problems caused by the use of set-top devices that disable features of consumer equipment related to tuning. The CAG plan further provided that cable systems that use scrambling would be required to provide component descrambler/decoders to subscribers that have Decoder Interface equipped receivers and VCRs. The CAG plan also specified that a standard cable television channel plan be used by both cable systems and "cable ready" consumer TV equipment.

15. On October 5, 1993, the Commission submitted to Congress its "Report to Congress on Means for Assuring Compatibility Between Cable Systems and Consumer Electronics Equipment" ("Compatibility Report").[15] In the Compatibility Report, the Commission concluded that the most appropriate course of action for addressing the cable system/consumer electronics compatibility matter would be a three phase plan. The first phase of this plan would provide immediate relief for the existing base of consumer equipment. The second would require more substantial measures in terms of standards for new equipment by both the cable and consumer electronics industries towards achieving more effective compatibility in the near future. The final step would encourage the development of consumer equipment and cable technologies that are more fully compatible in the long term. Consistent with this general plan, the Commission made a number of recommendations for specific steps to improve compatibility. These steps reflect the requirements for regulations specified in Section 17 and also include many elements of the plan suggested by the CAG, including reliance on supplemental equipment and consumer education to address problems with existing equipment, the use of the Decoder Interface connector and component descrambler/decoders to achieve more effective compatibility with new equipment and a requirement that new and rebuilt cable systems use a standard channelization plan. The Commission further indicated that these recommendations would form the basis for its proposals for compatibility regulations.

16. On November 10, 1993, the Commission adopted the *Notice* in this proceeding, proposing rules for ensuring compatibility between cable systems and consumer equipment that are consistent with the recommendations in the "Compatibility Report." Comments and/or replies responding to the *Notice* were submitted by 49 parties.[16]

DISCUSSION

17. Our goal in this proceeding is to assure compatibility between cable service and consumer electronics equipment so that cable subscribers can use the special features and functions of their TV sets and VCRs when receiving cable signals. Our compatibility rules must also allow for the needs and interests of cable operators in protecting their signals against theft or unauthorized use. We further believe it is important that these rules provide for and encourage competition in the market for equipment used by subscribers to receive cable service. Such equipment includes channel converters, remote control units and other customer premises equipment. The new regulatory program and rules set forth in the following sections are intended to reflect a balance of these considerations, while also minimizing the burdens they impose on consumers, cable operators and manufacturers of consumer electronics equipment.

Basic Approach for Achieving Compatibility

18. In the *Notice*, we proposed to employ the three-phase plan recommended in the "Compatibility Report" for achieving compatibility between cable systems and consumer electronics equipment. The first phase of this plan seeks to provide immediate relief for the existing base of equipment. In this first step, cable operators would be required to offer their subscribers supplemental equipment for resolving the specific compatibility problems addressed in Section 17, refrain from scrambling signals carried on the basic service tier, provide consumer education and allow the use of customer-owned remote controls. The second phase would specify measures as are necessary that relate to new equipment to be taken by both cable systems and consumer electronics manufacturers to achieve more effective compatibility in the near future. These measures would include new technical standards for "cable ready" consumer equipment, the use of Decoder Interface connectors and associated component descrambler/decoders and a standard cable channel plan for new "cable ready" consumer equipment and cable systems. The final step would be to develop standards for the next generation of cable and consumer electronics equipment. In this regard, we indicated that we intended to standardize the system used by the cable industry for digital transmissions. We recognized, however, that developmental work in this area is still in progress. We therefore requested suggestions for a

[14] The Decoder Interface would be an extension of the "multiport" connector that was included in a few TV receiver models several years ago. The multiport connector generally did not achieve significant use, however. Additional description of the Decoder Interface connector and the associated component descrambler/decoder is provided in the "Compatibility Report," *infra*.

[15] See "Report To Congress On Means Of Assuring Compatibility Between Cable Systems and Consumer Electronics Equipment," Federal Communications Commission, adopted October 5, 1993.

[16] The parties filing comments and/or replies are listed in Appendix B.

regulatory plan that would complete the development of a digital cable standard in a manner that would allow for timely and efficient introduction of consumer products that could receive digital cable service.

19. In the *Notice*, we also indicated that while the above approach appears to be the most practical solution for resolving the major problems of compatibility between cable systems and the special functions of consumer electronics equipment, we nonetheless believe the most desirable solution is for cable systems to use technologies that provide all authorized signals "in the clear."[17] We therefore stated that we intend to encourage the use and development of cable signal delivery methods, such as traps, interdiction, addressable filters and other clear channel delivery systems, that eliminate the need for any additional equipment on the subscriber's premises.

20. Most of the commenting parties generally concur with the basic approach of our proposal for achieving compatibility, although many disagree with, or suggest modifications to, specific elements of that plan.[18] For example, the CAG submits that our proposals represent a milestone toward realization of the objectives of Section 17 and that it supports the overall thrust and most of the details of this plan. The CAG states that greater ease-of-use improvements and cost savings are achievable only after a longer period of time, as both cable and consumer equipment are redesigned, and that the advent of digital cable transmission methods provides an opportunity to "get it right." It also agrees that our proposals to rely on an updated Decoder Interface connector and associated descrambler/decoder units, conformance by both cable systems and "cable ready" consumer equipment with a standard channel plan and new tuner and shielding standards for "cable ready" consumer equipment will avoid the need for use of set-top boxes in a cost effective manner for both cable system operators and their subscribers. Many other parties representing the interests of cable operators, manufacturers of consumer electronics consumer and consumers present similar statements and/or express support for the position expressed by the CAG. These parties generally agree that, given the large embedded base of consumer television equipment, the goal of improving compatibility cannot be achieved in a single step or completed in an abbreviated period of time.

21. O.D. Page (Page) and the Titan Corporation (Titan) argue that rather than adopt the Decoder Interface approach, which would result in ownership of more descrambler/decoder units by cable operators, we should allow subscribers to purchase descrambling equipment from third parties, while allowing cable operators to maintain control over the conditional access functions of the devices. They contend that current encryption technology is sufficiently secure to effectively prevent "piracy" even when incorporated in consumer equipment. Titan states that cases where the security system might be compromised could be handled by including security circuitry on replaceable "smart cards." Page and Titan argue that this approach would avoid the current cable industry monopoly on such equipment and allow the production of consumer equipment that would be more compatible with cable service.

22. A number of parties urge that we proceed cautiously in developing and applying standards for new equipment. These parties believe that rules adopted now to ensure compatibility may not provide the flexibility needed for development of future technologies, which will involve the increasing convergence of digital video, telecommunications, computing and other types of information processing. For example, General Instrument Corporation (GI), Greater Media, Inc. (Greater Media) and Tele-Communications, Inc. (TCI) argue that a rule requiring all cable services to be delivered through the Decoder Interface would stifle the introduction of innovative cable technologies and services. The American Telegraph and Telephone Company (AT&T) and Bell Atlantic submit that the proposed regulations regarding use of the Decoder Interface could inadvertently inhibit the development of competing video delivery service, such as video dialtone, and standards for future technologies. Bell Atlantic points out that the transmission parameters of the new Decoder Interface standard being developed by the CAG are markedly different from those of the Asymmetric Digital Subscriber Line (ADSL) technology it is deploying for a video dialtone trial. AT&T and the United States Telephone Association (USTA) submit that we should apply the rules adopted herein only to today's analog equipment. BellSouth Telecommunications, Inc. (BellSouth) asks that we clarify that the compatibility regulations being adopted herein apply only to cable systems and do not apply to local exchange carriers providing video dialtone services. In its reply comments, the National Cable Television Association (NCTA) disagrees with the concerns of those parties that argue the Decoder Interface standard might not be appropriate for use with distribution media other than cable or that it might impede the introduction of new services. NCTA states the Decoder Interface proposed by the CAG should be able to accommodate new technological developments without ever requiring the use of set-top boxes on TV receivers and VCRs equipped with Decoder Interfaces.

23. The New York City Department of Telecommunications and Energy (NYC) and the Lakes Region Cable Television Consortium (LRCTC), an organization of several communities in New Hampshire, support our intent to encourage use of cable security technologies that provide signals to subscribers "in the clear." NYC and LRCTC indicate that their constituents are experiencing the types of problems resulting from use of set-top devices that are discussed in Section 17 and the *Notice*. For example, LRCTC states that its constituents have been confused and frustrated by the local cable system's recently-initiated scrambling of satellite-delivered signals. Multichannel Communications Sciences, Inc. (MCSI) submits that we should take specific steps to encourage use of "in the clear" technologies. MCSI argues that the Decoder Interface standards development process is likely to be lengthy and that consumer equipment with Decoder Interface connectors will not be available before the year 2000. It believes we should only rely on the Decoder Interface for accommodating

[17] With "in the clear" technologies, all of the signals a subscriber purchases are available simultaneously, so that multiple signals may be tuned, for viewing or recording, at the same time.

[18] The commenting parties' requests for modification and/or clarification of specific aspects of our proposals are discussed in the sections which follow.

digital transmissions. MCSI therefore recommends that more substantial compatibility be achieved in two separate steps: the first would implement channel tuning and RF interface improvements; the second would implement a Decoder Interface for accommodating digital transmissions. To provide an incentive for cable operators to use "in the clear" technologies, it asks that we allow higher benchmark rates for tiered program services delivered "in the clear." In its reply comments, the Consumer Electronics Retailers Coalition agrees that specific incentives would be useful to promote the development and use of "in the clear" technologies.

24. On the other side, commenting parties representing cable interests argue that we should abandon our preference for "in the clear" service. For example, TCI states that "in the clear" technologies have shortcomings as cable security measures and that we should not influence cable operators to use such technologies in lieu of scrambling. The CAG similarly argues that while traps, interdiction, broadband scrambling and related techniques each may have certain virtues, they all have limitations and characteristics that prevent them from being a reasonable a mandatory solution to compatibility issues. TCI further argues that we should not provide a competitive advantage to technologies competing with scrambling. GI contends that our preference for clear channel technologies is contrary to the demonstrated virtues of scrambling.

25. Cablevision Systems Corporation (CVS) opposes the general approach of our proposals for improving compatibility. CVS contends that our short-term proposals regarding supplementary equipment and mandatory provision of basic tier signals "in the clear" threaten to compromise signal security, create further consumer confusion and reverse advances in set-top devices made to resolve interference, picture quality, channelization and signal leakage problems. Rather than the multiple provisions proposed in the *Notice*, CVS believes that it would be preferable to require only a consumer information and education program in the short term.

26. Several parties, including CVS, Continental Cablevision, Inc. (Continental) and GI argue that any requirements and standards that we adopt for cable should also be applied to other multichannel video programming providers, such as direct broadcast satellite service (DBS), TV receive-only (TVRO) satellite service, satellite master antenna TV systems (SMATVs) and video dialtone. These parties submit that similar problems of compatibility exist with respect to other video delivery media and are also concerned that the compatibility regulations for the cable industry could leave cable operators at a competitive disadvantage with respect to other video media. In its reply comments, DIRECTV, Inc. disagrees with these parties, arguing that subjecting other video media to the cable compatibility requirements would constrain the ability of such media to employ alternative video interfaces and digital delivery systems.

27. We find that the three-phase approach proposed in the *Notice* will provide the most efficient and effective means for achieving compatibility between cable systems and consumer electronics equipment.[19] The provisions of the first phase of this program recognize the difficulties inherent in improving compatibility between existing cable system and consumer equipment that cannot be readily modified. The thrust of these provisions is to ensure that cable subscribers are aware of compatibility problems and to require cable operators to take a series of meaningful steps to minimize the effects of compatibility differences. Cable operators will be required to assist their subscribers in overcoming the most troublesome problems, particularly those involving the use of multiple tuning functions that are addressed in Section 17 of the 1992 Cable Act. The plan of the second phase is to take advantage of the opportunity for designing new equipment to achieve more effective compatibility. The final phase will seek to ensure compatibility between cable systems and consumer equipment in the transition to the next generation of cable technologies, while also attempting to allow maximum flexibility for new technologies and services to develop.[20]

28. We believe the gradual nature of this regulatory program reasonably balances the statutory factors we are required to consider in prescribing these regulations.[21] Our approach will minimize the burdens of achieving compatibility for both industry and consumers, while also bringing the benefits of cable compatibility to consumers by minimizing the interference to, or nullification of, the special functions of TV receivers and VCRs.[22] We have also attempted to minimize the burdens of the specific provisions of this plan and to distribute those burdens across the cable operators, manufacturers of consumer electronics equipment and consumers. Moreover, with the exception of programming carried on the basic tier of service, the new rules will continue to allow cable operators to use their own discretion in choosing the method they use to protect their programming from theft.

29. We disagree with Page and Titan that we should require cable operators to allow consumers to own descrambling equipment and to purchase such equipment from third parties. While we are aware that there have been advancements in encryption technology, we also understand that it is most important to cable operators that they be able to control the means used to access their programming. Moreover, signal thieves have been notoriously successful at defeating security systems for video programming services. We therefore will not require cable systems to allow their subscribers to own descrambling equipment. We do, however, recognize that it is possible to separate access control functions from other functions that may be performed in conjunction with the use of cable service, such as display of menus and decompression of digital signals. As discussed in the next section, we support separation of these functions as a means for promoting competition in the market for equipment used to receive cable service.

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[19] We also conclude that this phased-in regulatory approach is consistent with the requirements of Section 17 that we, within 180 days after submission of the "Compatibility Report" to Congress, "issue such regulations as are necessary to assure such compatibility," and "review, and if necessary, modify the regulations issued pursuant to this section in light of any actions taken in response to such regulations and to reflect improvements and changes in cable systems, television receivers, videocassette recorders and similar technology." Sections 624A(b)(1) and (d), Section 17 of the 1992 Cable Act, *supra*.

[20] The rules adopted herein are set forth in Appendix A.

[21] Section 624A(c)(1), Section 17 of the 1992 Cable Act, *supra*.

[22] *Id.*

30. We share the concerns of those parties who urge that we proceed cautiously in adopting compatibility rules and standards for new equipment, digital systems and other new technologies and services. While we expect that the Decoder Interface connector will be flexible enough to accommodate most, if not all, of the attributes of cable digital service, we also appreciate that any such standard could constitute a gateway that constrains the development of new technologies. Moreover, the potential for such a constraining effect is substantially greater in the current period, where there is rapid development of new communications technologies and services that are distinctly different from those available in the past. Further, as AT&T and Bell Atlantic observe, the development of cable digital services will also be accompanied by questions about the compatibility of those services with other media. In view of these considerations, we believe the best approach is to plan for compatibility with future technologies and services to the extent possible now, with the understanding that it may be necessary to accommodate new developments that may not be fully compatible with standards we adopt now. If new digital and other technologies have important features that are not compatible with the standards we adopt now, we will make appropriate changes in our rules to accommodate their operation. In this regard, we intend to initiate a separate proceeding, as discussed below, to consider digital standards for cable service. As part of that proceeding, we will ensure that new incompatibilities do not arise between the digital service provided by cable systems and the digital equipment used by consumers to receive that service.

31. We disagree with those parties who argue that we should not seek to promote the use of "in the clear" technologies. While scrambling provides a high degree of security for cable operators, it also is the greatest source of equipment compatibility problems for consumers. We are not convinced that it is not feasible to develop a security approach that provides comparable security at a cost effective price while delivering subscribers all authorized signals in the clear. We applaud the efforts of MCSI and others to develop and introduce "in the clear" security systems. While we are not mandating the use of any form of "in the clear" technologies, we will continue to pursue policies that will promote the development and use of such systems. MCSI's request that we allow higher benchmark rates for tiered cable services provided "in the clear" is beyond the scope of this proceeding.

32. We reject CVS's suggestion that we limit our first-phase rules for ensuring compatibility to requirements for consumer' education and information. We believe that the additional compatibility measures we are requiring provide more effective compatibility and, contrary to CVS's suggestion, continue to provide signal protection. Thus, we conclude that CVS's approach would not effectively ensure that there is compatibility between cable service and consumer electronics equipment, and therefore would not as effectively implement the thrust of Section 17 of the 1992 Cable Act as our approach.

33. In response to the issues raised by BellSouth, CVS, Continental and GI about application of the cable compatibility rules to other video media, we are clarifying that the rules adopted herein will apply only to operations by a cable system, as defined in Section 76.5(a) of our rules.[23] Application of these rules to other video media is beyond the scope of this proceeding. We will consider issues concerning compatibility among alternative services in the appropriate context, as they might arise.

Decoder Interface Connector

34. In the *Notice*, we proposed to require that "cable ready" equipment include a Decoder Interface connector that meets the specifications of the existing multiport standard, EIA/ANSI 563.[24] We also noted that the CAG, in conjunction with the Joint Engineering Committee (JEC) of the EIA and the NCTA was developing an updated version of this standard to provide a hybrid analog/digital Decoder Interface that would be able to be used for both present analog signals and new digital TV signals.[25] The new Decoder Interface standard is also being designed to accommodate further advances in video transmission systems and services. We therefore proposed to adopt this updated standard, as an alternative to the multiport standard, if it were available in sufficient time for us to obtain comment on it before we complete our decision in this matter. We also proposed to require cable system operators that do not use "in the clear" signal delivery technology to supply their subscribers with component descrambler/decoders to process scrambled and/or digital video service through the Decoder Interface and to provide service in a form that is compatible with a component descrambler/decoder. Consistent with our recommendations in the Compatibility Report, we further proposed to require cable operators to provide component descramblers to subscribers without a separate charge for the equipment or its installation.

35. The majority of the commenting parties support our proposal to promote fuller compatibility through use of a Decoder Interface connector and associated component descrambler/decoder devices. They also strongly recommend that we adopt the updated Decoder Interface standard being developed by the JEC, rather than the current EIA/ANSI 563 standard. The CAG indicates that while the JEC's efforts to develop a new standard are not yet complete, it has made substantial progress in that endeavor.[26] The commenting parties therefore urge that we invoke the substantial discretion accorded to the Commission by Section 17 and adopt rules regarding the Decoder Interface requirements after completion of the new standard.

36. In recommending this course of action, the CAG states that the cable and consumer electronics industries believe that the JEC's updated standard would be much

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[23] 47 C.F.R. § 76.5(a).

[24] *See* The Electronics Industry Association/American National Standards Institute's "Standard Baseband (Audio/Video) Interface Between NTSC Television Receiving Devices and Peripheral Devices," EIA/ANSI-563-1990 (EIA/ANSI 563).

[25] These future digital video signals would include both compressed standard definition and advanced television signals.

[26] The CAG included a copy of the "Interim Report of the JEC's Decoder Interface Subcommittee on EIA IS-105" that presents the current state of the work on developing the new Decoder Interface standard. This interim report states that the new EIA IS-105 standard will provide complete compatibility with all of today's analog scrambling systems and has also been designed to be extensible to future digital services. This document also indicates the work that remains to be completed.

more beneficial for cable subscribers than the existing EIA/ANSI 563 standard and that they are firmly committed to completing the development and implementation a new Decoder Interface connector.[27] GI, Greater Media and TCI point out that EIA/ANSI 563 is incompatible with certain analog scrambling methods, digital video compression and the numerous interactive media on the horizon. The Joint Cable Commenters and Zenith Electronics Corporation (Zenith) submit that the improvements in the new standard, particularly the ability to accommodate all current analog scrambling methods and to provide a solid transition path to digital transmissions, are worth the wait for the new standard to be completed. CVI notes that the updated standard will also support on-screen display and force tuning functions. The Interactive Media Association (IMA) believes that the new standard will provide a good foundation for the development of new products and services while insulating consumers from the costs and complexities of evolving technology. NCTA, in its reply comments, indicates that the design of the updated Decoder Interface will provide the necessary avenues for new services, whether transmitted in analog mode or modulated digital or baseband digital modes.[28]

37. Several parties, including Circuit City Stores, Inc. (Circuit City), Mitsubishi Electronics of America (Mitsubishi) and News Datacom, Inc. (News Datacom) submit that the Decoder Interface standard should provide for separating conditional access technology, *i.e.*, security measures, from other functions performed through the Decoder Interface connector. These parties state that this approach is needed to provide for a competitive market in equipment used to receive cable service. They are concerned that the Decoder Interface standard could otherwise allow cable operators to bundle into component descrambler/ decoder dnits devices, and thereby achieve a monopoly on, circuitry for features other than security, such as decompression, program selection and menus. These parties state that separating conditional access technology from other functions in the Decoder Interface standard would allow processing circuitry for new features of cable service to be integrated into new TV receivers and VCRs or into new set-top or decoder/descrambler equipment that would be available on the open market. Mitsubishi observes that the JEC has made significant progress towards a standard for an inexpensive "conditional access card" that isolates all security elements into one removable medium and that this could be incorporated into the updated Decoder Interface standard. Circuit City and Mitsubishi urge that we advise the CAG to implement the conditional access card as part of the Decoder Interface standard.

38. Many parties also address our proposals with regard to cable operators' responsibilities to supply subscribers with component descrambler/decoders, to do so without separate charges and to provide service in a format that is compatible with these devices. On a related issue, MCSI requests that we clarify our policy with regard to charges by cable systems for descrambling equipment that may be located either inside or outside of a subscriber's premises. MCSI believes that cable operators should be allowed to charge separately for this equipment, which it argues performs the same functions as set-top descramblers.

39. We concur with the commenting parties that the public interest would be better served by adopting an updated Decoder Interface standard. The introduction of this feature in new consumer TV equipment and its use with component descrambler/ decoders will constitute a significant step toward achievement of more effective compatibility between cable systems and consumer electronics equipment at reasonable cost. The numerous improvements in the forthcoming standard, particularly its capabilities for serving all existing scrambling systems, for accommodating new cable technologies and services and for providing a migration path to digital cable service, make it a clear choice over the existing EIA/ANSI 563 standard. Moreover, as noted by the IMA, the improvements in the new standard are expected to provide a substantial buffer to consumers against new incompatibilities that typically arise from the differences in equipment cycles in the consumer electronics and cable industries.[29]

40. We recognize that the JEC has been working diligently on the new standard and that considerable progress has been made relatively quickly in these efforts. We also note that the time period available for addressing the complex technical and design issues in this standard has been very short, and that additional time is needed to complete this work. Accordingly, we will establish a Decoder Interface standard and address all aspects of rules regarding its use, including consideration of whether we should not allow cable operators to charge separately for component descrambler/decoders and require them to provide service in a format that is compatible with these devices, pending completion of an acceptable updated standard. We will also address MCSI's request for clarification of our policy on separate charges for equipment that can be located either inside or outside a cable subscriber's premises after the completion of an acceptable Decoder Interface connector standard.

41. We wish to emphasize that we consider the Decoder Interface connector and associated component descrambler/decoders to be an important part of our equipment compatibility program and therefore are concerned that the new standard be completed as expeditiously as possible. We believe a period of 90 days from the publication of this decision should be sufficient for the JEC to complete its work on the Decoder Interface standard. We urge the JEC to continue in its efforts and to finalize the new Decoder Interface standard within this 90-day period. If the new standard is not available after that period, we will establish a standard using our own internal resources.

42. We agree with those commenting parties who argue that the Decoder Interface should provide the capability to separate signal access control functions from other functions served through the connector. This capability will allow non-security functions to be provided through new products offered by retail vendors or to be incorporated

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[27] The CAG also indicates that the cost of including the Decoder Interface in consumer TV equipment will be relatively low.

[28] NCTA explains that the Decoder Interface is expected to include approximately 20 pins, plus both RF and IF connectors. It states that by designing the point of compatibility as the juncture where the television receiver or VCR interface receives the pins of the companion component descrambler/decoder, virtually any service or distribution technology can be accommodated.

[29] Thus, we conclude that it is not necessary to adopt rules regarding a Decoder Interface connector standard at this time.

into TV receivers and VCRs, thereby promoting competition in the market for equipment used to receive cable service. We therefore are advising the parties developing the new standard that the Decoder Interface standard we adopt must allow access control functions to be separated from other functions. While our statutory mandate directs us to ensure compatibility between consumer electronics equipment and cable systems, we do not wish to accomplish that goal at the expense of impeding consumer access to competing video delivery systems, such as home satellite dish, Direct Broadcast Satellite and wireless cable. We therefore urge that representatives of those and other affected industries be included in the Decoder Interface standard deliberations.

Rules for Existing Equipment

43. *Supplemental Equipment* . In the *Notice*, we proposed to require cable systems that use scrambling to provide their subscribers with supplemental equipment, such as set-top devices with multiple descramblers and/or timers and by-pass switches, to enable the operation of extended features and functions of TV receivers and VCRs that make simultaneous use of multiple signals. This equipment would be provided upon the request of individual subscribers. We further proposed to require cable operators to provide their subscribers the option of receiving all signals whose reception does not require use of a converter directly at the subscriber's TV receiver or VCR, without passing through a set-top device. This capability could be provided through use of by-pass switches or similar equipment, or by avoiding the need for use of set-top devices altogether. We also proposed to allow cable systems to provide supplemental equipment for improving compatibility at the request of individual subscribers and to permit them to charge for this equipment and its installation in accordance with our rate regulations for customer premises equipment used to receive the basic service tier.[30]

44. The commenting parties generally support the proposed requirements for provision of supplemental equipment by cable systems. The CAG and GI submit that, collectively, these measures will facilitate the use of advanced picture generation and display features in TV receivers, allow subscribers to watch one program while recording another and permit sequential recording of programs on different channels, albeit with some additional cost and wiring complications. The CAG indicates that the widespread availability of supplementary hardware will ameliorate many of the compatibility problems Section 17 seeks to address. TCI states that given the unsynchronized technology cycles of the cable and consumer electronics industries, these supplementary devices will always play an important role in achieving compatibility.

45. A number of the commenting parties suggest modifications to our proposals regarding supplemental equipment. To save consumers time and money, John Fitzgerald, a cable subscriber, suggests that the rules also provide that subscribers may pick-up the supplemental equipment from their cable system's operations center and install it themselves. The Joint Cable Commenters ask that the language relating to delivery of unscrambled programming "without passing through the set-top device" be clarified, as many set-top devices have internal bypass switches. NYC recommends that we require that supplementary equipment provided by cable operators to improve compatibility include stereo outputs on baseband audio terminals. The Sacramento Metropolitan Cable Television Commission (SMCTC) recommends that these requirements be strengthened to specify that the "more consumer-friendly" set-top boxes have at least an 8-event/7 day programmability capability.

46. Parties representing cable interests generally favor our proposal to allow cable operators to charge for supplementary equipment in accordance with the provisions of our rate regulations. TCI, Time Warner Entertainment Company, L.P. (Time Warner) and others state that this approach will allow cable operators to recover all the cost of such equipment and also will distribute the cost to those who need the equipment. NYC also agrees that we should allow cable operators to charge for supplemental equipment in accordance with our rate regulations, but recommends that we not allow cable operators to charge for its installation. NYC states that prohibiting charges for installation would encourage cable operators to fully inform subscribers of installation options at the time of the initial installation. SMCTC submits that we should allow a one-time installation charge for supplementary hardware, but not allow separate ongoing monthly charges. CVS submits that we should not require cable operators to offer subscribers both multiple descramblers and bypass switches. It argues that this would create consumer confusion and contribute to signal leakage, low picture quality and other technical problems. CVS submits that cable operators should be allowed to determine the appropriate mix of technology for resolving compatibility problems. Greater Media requests that we clarify that dual descrambler devices would be available from cable operators, rather than from retailers.

47. We conclude that the supplemental equipment proposed in the *Notice* offers the means to achieve immediate relief for the compatibility problems between existing cable systems and consumer electronics equipment in cases where cable systems use scrambling technology and set-top boxes that do not deliver all authorized signals "in the clear." In such cases, devices such as by-pass switches and set-top devices that include multiple descramblers and/or timers that can be programmed to tune to alternative channels sequentially can, to a significant degree, provide cable subscribers with the ability to operate the types of special functions with their VCRs and TV receivers that are addressed in Section 17 of the 1992 Cable Act. We therefore are adopting our proposal to require cable operators that use scrambling systems to offer their subscribers supplemental equipment to enable the operation of extended features and functions of TV receivers and VCRs that make simultaneous use of multiple signals.[31] We also conclude that compatibility problems resulting from use of set-top devices can be reduced if subscribers are able to receive "in the clear" all signals that need to be processed by the device. This capability can generally be provided through a by-pass switch, or as indicated by the Joint Cable Oper-

[30] *See* 47 C.F.R. § 76.923.

[31] As discussed below, in the section addressing the consumer education program, cable operators will also be required to advise their subscribers that, except for hardware used only to control signal access, *e.g.*, set-top boxes with multiple descramblers, supplemental equipment for improving compatibility may also be obtained from retail outlets.

ators, through internal by-pass circuitry in a set-top box. We therefore are requiring cable operators to offer their subscribers the capability to receive "in the clear" all signals that do not need to be processed by descrambling or other special circuitry in a set-top device.

48. We are not specifying a particular "package" of supplemental hardware that must be provided by cable systems nor the performance characteristics of the features of such equipment. The amount and types of supplemental hardware needed to resolve compatibility problems will vary depending on a variety of factors, including the consumer electronics equipment used by individual cable subscribers, the types of compatibility problems subscribers desire to address, whether they desire special features such as stereo or multiple-day timing capability, and how much consumers are willing to pay for the improvements they want. In order to provide cable operators latitude to tailor supplemental hardware to the needs of individual subscribers, the rules only will identify the general types of supplemental hardware to be offered and the types of compatibility problems that are to be addressed through such hardware. We will simply require cable operators to undertake a good faith effort to provide the types of equipment needed by individual subscribers. While we encourage cable operators to allow subscribers to pick up supplemental equipment from the cable system's operations center, we are not requiring this practice. This is consistent with our existing policy that allows cable operators to determine their own installation practices. Inasmuch as the purpose of supplemental equipment is to improve individual subscribers' use of cable service, we believe the cost of this equipment and its installation should be the responsibility of those subscribers who request it. We therefore will allow cable operators to charge for this equipment and its installation in accordance with our rate regulations for customer premises equipment used to receive basic service. Subscribers may, of course, choose to use supplemental equipment obtained from retailers for resolving compatibility problems, rather than obtain that equipment from their cable system. As indicated below, cable operators will be required to notify their subscribers that supplemental equipment for improving compatibility may be obtained from retail outlets. In response to Greater Media's concern, these requirements do not require that cable system operators allow subscribers to use multiple descrambler/decoder equipment that might be obtained from retailers or other parties.

49. *Scrambling of Signals on the Basic Service Tier.* In the *Notice*, we proposed to prohibit cable systems from scrambling signals carried on the basic tier of cable service. This proposal was intended to ensure that consumers who have purchased TV receivers and VCRs capable of tuning basic service channels are able to continue to receive service on those channels without the need for a set-top device. We also observed that cable systems often include additional channels on their basic tier beyond those required to be on the basic tier under our rules.[32] We requested comment on whether such signals should be exempted from the prohibition on scrambling of signals on the basic tier.

50. The CAG, GI, NYC, Pacific Bell, SMCTC, Time Warner and others generally support our proposal to prohibit scrambling of signals on the basic tier. Several of these parties note that, as we observed in the *Notice*, in current practice the basic service tier is nearly always unscrambled. They state that this is because theft of basic service is less of a problem than is theft of other services, and that it is beneficial to allow subscribers to access basic tier channels without using a descrambling set-top box. Pacific Bell and John Fitzgerald point out that scrambling any basic tier signals necessitates that subscribers rent a set-top descrambler from the cable system to receive all of the signals purchased. Pacific Bell states that prohibition on scrambling of basic tier signals will avoid the need for this additional equipment and thereby reduce consumers' real cost to subscribe to basic only service. In joint reply comments, the Consumer Federation of America and the Home Recording Rights Coalition (CFA/HRRC) suggest that cable operators should not be allowed to scramble any signals on regulated tiers of service that were not scrambled prior to the enactment of the 1992 Cable Act.[33] They state that it is reasonable to presume that if a signal were not scrambled before the 1992 Cable Act, there is no need to scramble the signal now or later. CFA/HRRC submits that for exceptions to this rule, we should establish a procedure allowing for public comment, where an operator would have the burden of demonstrating that a significant security threat that did not exist previously now exists or that a new service offered as part of a regulated tier should not be offered in the clear.

51. Most of the commenting parties that support prohibiting the scrambling of basic tier signals also believe that a waiver procedure is needed to allow cable systems experiencing theft of service problems to scramble basic channels.[34] The CAG states that such a procedure should provide for expedited handling of waiver requests and that a more exacting burden of proof should apply to waivers involving mandatory basic tier signals, *e.g.*, local broadcast signals or access channels for public, education, or government services, than waivers involving non-mandatory channels.[35]

52. A number of commenting parties representing cable interests oppose our proposal to prohibit scrambling of signals carried on the basic service tier. These parties generally submit that scrambling of signals on the basic tier is not a problem because such scrambling is not a common practice. These parties further argue that in some cases scrambling of basic service is needed to protect against signal theft. Continental states that a prohibition of scrambling on the basic tier will discourage cable operators

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[32] Section 76.901(a) of our rules provides that the basic service tier shall, at a minimum, include all signals of domestic broadcast stations provided to any subscriber (except a signal secondarily transmitted by satellite carrier beyond the local service area of such station, regardless of how such signal is ultimately received by the cable system), any public, educational and governmental (PEG) programming required by the franchise to be carried on the basic tier and any additional video programming signals added to the basic tier by the cable operator. *See* 47 C.F.R. §76.901(a).

[33] Regulated tiers include the basic service tier and cable programming service tiers, as defined in Section 76.901(a) and (b) of our rules, 47 C.F.R. §§76.901(a) and (b).

[34] The CAG states that cable systems at increased risk of signal theft may include those for which demand is highly affected by seasonal considerations, those that have high subscriber turnover, and those that experience measurable loss of effectiveness in their existing security techniques.

[35] The signals required to be carried on the basic tier are specified in Section 76.901 of the rules, 47 C.F.R. §76.901(a).

from adding services to that tier. CVS states that where recurrent non-payment situations are common, scrambling also reduces costs by allowing the cable operator to manage service without a truck-roll to disconnect and reconnect service. CATA also is concerned that the use of compressed video could be viewed as scrambling and that the proposed rule could then preclude small systems with a limited number of channels from using compression technology.

53. Barden Cablevision (Barden) argues that a prohibition on scrambling signals on the basic tier would ignore serious exposure to theft for single tier cable operators. Barden suggests that, if we adopt the scrambling prohibition, we modify it for single tier cable systems to either delay its implementation until such time as new technologies are readily available to facilitate compatibility between signal scrambling and consumer equipment, or exempt such systems where they have already installed scrambling.

54. Many parties representing cable interests argue that, at a minimum, we should exempt from the scrambling prohibition all channels carried on the basic tier beyond those required to be carried there. Barden and the Joint Cable Commenters state that such an exemption would preserve cable operators' ability to use scrambling to protect programming that is susceptible to theft. Barden also states that since most cable operators do not scramble basic tier signals, permitting them to scramble signals beyond the required tier components would have little impact on the overall effectiveness of our program for improving equipment compatibility. Continental suggests that if we decide to prohibit scrambling on the basic tier, we should also grandfather existing systems that have historically scrambled basic signals as an anti-theft measure, and provide a waiver process for systems facing serious theft problems. NYC, Pacific Bell and SMCTC believe that the prohibition on scrambling of signals on the basic tier should apply to all signals carried on that tier. Pacific Bell argues that since the price of basic service includes the cost of any non-mandatory channels added to the basic tier, cable subscribers are entitled to receive those channels without the need to use additional equipment for which an additional fee is charged.

55. We find that our proposal to prohibit scrambling of signals carried on the basic tier is appropriate as a means to promote compatibility between cable service and consumer electronics equipment. We also conclude that the prohibition on scrambling of basic signals should include both signals carried on the basic tier and any other signals that cable operators may choose to add to that tier. This rule will significantly advance compatibility by ensuring that all subscribers are able to receive basic tier signals "in the clear" and that basic-only subscribers will not need set-top devices at all. This rule also will have minimal impact on the cable industry in view of the fact that most cable systems now generally do not scramble basic tier signals.

56. We recognize that cable operators may have a stronger interest in protecting "non-mandatory" signals carried on the basic tier than the required signals. However, the fact that cable operators generally do not scramble non-mandatory signals carried on the basic tier now is indicative of the fact that theft of these signals is not a major problem and that the scrambling prohibition will not discourage cable operators from adding signals to the basic tier. On the other hand, as indicated by Pacific Bell and John Fitzgerald, routine scrambling of these signals would pose a problem for basic-only subscribers, because it would require them to rent a set-top descrambler and perhaps also to obtain supplemental equipment, at additional cost and inconvenience. Accordingly, we are prohibiting cable operators from scrambling any signals carried on the basic service tier.

57. We do, however, understand that there are instances where cable operators may need to scramble signals to prevent theft of service or to address other operating problems such as the billing situation indicated by CVS. To accommodate such cases, cable operators may seek a waiver of the scrambling prohibition. Cable operators requesting such waivers will be required to demonstrate either a substantial problem with theft of basic tier service or a strong need to scramble basic signals for other reasons. As recommended by CFA/HRRC, cable operators will also be required to notify subscribers of waiver requests. Specifically, a cable operator must notify subscribers by mail that it has filed a request for waiver of the scrambling prohibition with the Commission. The notice to subscribers must be mailed no later than thirty calendar days from the date the request waiver was filed with the Commission.[36] The notice shall state the following:

> On (date of waiver request was filed with the Commission), (cable operator's name) filed with the Federal Communications Commission a request for waiver of the rule prohibiting scrambling of channels on the basic tier of service. 47 C.F.R. Section 76.630(a). The request for waiver states (a brief summary of the waiver request). A copy of the request for waiver is on file for public inspection at (the address of the cable operator's local place of business).
>
> Individuals who wish to comment on this request for waiver should mail comments to the Federal Communications Commission by no later than 30 days from (the date the notification was mailed to subscribers). Those comments should be addressed to the: Federal Communications Commission, Cable Services Bureau, Washington, D.C. 20554, and should include the name of the cable operator to whom the comments are applicable. Individuals should also send a copy of their comments to (the cable operator at its local place of business).

A cable operator may file comments in reply to subscriber comments no later than 7 days from the date subscriber comments must be filed. In assessing the waiver request, the Commission will consider issues raised in the subscriber comments and the cable operator's response to such issues in light of the criteria indicated above in determining whether to grant a waiver.

58. Although we are not adopting CFA/HRRC's suggestion that cable operators not be allowed to scramble any signals carried on regulated tiers that were not scrambled prior to the enactment of the 1992 Cable Act, we agree

[36] Cable operators must inform the Commission in writing, as soon as possible, of the date on which they mail the notification to subscribers in order to allow the Commission to calculate correctly the filing deadline for subscriber comments.

that such a policy merits further consideration. We agree with CFA/HRRC's position that it seems reasonable to presume that if a signal carried on a regulated tier was not scrambled before the 1992 Cable Act, there is no need to scramble that signal now or in the future. Moreover, as observed by Pacific Bell and John Fitzgerald, the routine scrambling of these signals also causes significant compatibility problems for subscribers by necessitating the use of set-top descramblers. However, we believe an expanded record on this issue will better aid us in our deliberations. Therefore, we intend to include consideration of this issue in the same upcoming Further Notice of Proposed Rule Making that will address the Decoder Interface standard and related issues.

59. In response to CATA's concern regarding compressed video carried on the basic tier, the Decoder Interface approach that we are pursuing should provide for processing of compressed video signals. We intend to investigate this matter further in our future proceeding on digital video transmission standards, as discussed below. We are not persuaded that our scrambling prohibition should be modified for single tier cable systems. Where such systems might experience signal theft problems they are free to re-tier as appropriate.

60. *Remote Controls.* In the *Notice*, we proposed to require cable operators that offer subscribers the option of renting remote control units to operate set-top devices to permit the operation of their set-top devices with such commercially available remote control units, and take no action that would prevent the use of such remote control units.[37]

61. The commenting parties that address this issue support our proposals for regulation of cable system remote control practices as consistent with the provisions of Section 17. Greater Media states that cable operators may need to disable remote control functions either to respond to a request by a subscriber or to avoid conflicts between devices in cases where two separate descramblers are used. CFA/HRRC submits that we should also prohibit cable operators from changing the infrared codes they use for remote controls if the new infrared codes will adversely affect the operation of previously-compatible remote controls. CFA/HRRC states that, absent such a prohibition, new infrared codes could disable a remote control that was compatible when it was purchased, and consequently cable subscribers would be reluctant to purchase remote controls from retail outlets.

62. We are adopting a requirement that cable operators allow their set-top devices that incorporate remote control capability to be operated with subscriber-owned remote controls or otherwise take no action to prevent the use of such remote controls. This requirement is somewhat more encompassing than our proposal, which would only have applied this requirement to cable systems that rent remote control units. However, on reviewing Section 624(c)(2)(E) of Section 17 of the 1992 Cable Act, we find that the statute mandates that this requirement apply to all cable systems.[38] We advise cable operators that this requirement obliges them to actively *enable* the remote control functions of set-top devices where those functions do not operate without a special activation procedure.[39] As an exception to this rule, we will permit cable operators to disable the remote control functions of a set-top device in cases where the subscriber so requests. Under this exception, a cable operator that needs to disable the remote control functions of a set-top box to resolve a problem, such as the conflict between two descramblers mentioned by Greater Media, could do so with the consent of the subscriber.

63. Our requirement that cable operators otherwise take no action to prevent the use of subscriber-owned remote controls also includes CFA/HRRC's suggestion that we prohibit cable operators from changing the infrared codes used to operate the remote control capabilities of the set-top devices they employ. This requirement will necessitate that the remote control capabilities of any replacement customer equipment provided to subscribers employ the same infrared codes for remote control that are used with the subscriber's existing set-top equipment. This will avoid the need for subscribers to replace remote control units they own if the cable operator changes their set-top box. We do not believe this will be a significant burden for cable operators, as they can simply chose replacement equipment that operates with the same infrared codes as their existing equipment.[40] This requirement will not prevent cable operators from using new equipment that includes additional infrared codes for new remote control functions that were not included in existing models of equipment.

64. *Consumer Education.* In the *Notice*, we proposed to require cable operators to provide a consumer education program on compatibility matters to their subscribers. This information would be provided to cable subscribers in writing at the time they first subscribe and at least once a year thereafter.[41] As proposed, the consumer education program would include a written notification that, in cases where a set-top device is used to receive service, subscribers may not be able to use special features and functions of their TV receivers, including functions that allow the subscriber to:

- View a program on one channel while simultaneously recording a program on another channel;
- Record two or more consecutive programs that appear on different channels; and,
- Use advanced picture generation and display features such as "Picture-in-Picture," channel review and other functions that necessitate channel selection by the consumer device.

The proposed consumer education program would further require cable operators to inform subscribers that some models of TV receivers and VCRs may not be able to

[37] We also proposed to permit cable operators to disable the remote control functions of a subscriber's set-top device in cases where the subscriber so requests.

[38] Section 624A(c)(2)(E), Section 17 of the 1992 Cable Act, *supra*.

[39] We note that the remote control functions of many existing models of set-top devices do not operate unless they are activated by a code transmitted from the cable system headend.

[40] In quantity orders, cable operators will be able to specify the specific codes to be used in new equipment.

[41] After the initiation of service, cable systems would be permitted to choose the time and means by which to meet the annual consumer information requirement. For example, cable systems could choose simply to include the yearly consumer information on compatibility in a mailing with one of their regular billings to subscribers.

receive all of the channels offered by the cable system when connected directly to the cable system. It would also briefly explain the types of channelization incompatibilities subscribers could encounter when connecting their equipment directly to the cable system and offer suggestions for resolving channelization problems. Such solutions could include the use of a set-top channel converter device that subscribers could obtain from either the cable operator or a third party retail vendor.

65. We also proposed to require cable operators that offer remote control capability with their set-top devices to include in their consumer education program a written notification that subscribers may purchase from other sources a remote control unit that is compatible with the set-top devices. Under this proposal, cable systems would be required to list the models of remote control units that are compatible with the set-top devices they employ and to provide a list of sources where those models can be obtained in the local area. This list would be required to be current as of no more than 60 days before the yearly mailing of consumer information.

66. The commenting parties generally support our proposal for a consumer information program. For example, the CAG believes the proposed consumer information requirements will satisfy the information requirements of Section 624A(c)(2)(B) and will generally assist cable subscribers in understanding compatibility problems they may encounter. It indicates that although these requirements will apply to the cable industry, the consumer electronics industry will assist in developing educational materials for meeting the new requirements.

67. The commenting parties also request modifications to some of the specific requirements of our proposal. CVS asks that we clarify that the requirement to inform subscribers of the availability of set-top converter devices from third party vendors applies to basic converters without descrambling capability and that cable operators do not have to advise their subscribers of the commercial availability of descrambling equipment, including addressable decoders. Greater Media notes that a subscriber's remote control equipment may no longer be functional if the cable system changes his/her converter unit. It requests that in such cases a cable operator's responsibility not extend beyond the need to caution subscribers that such situations may occur from time to time. NYC requests that the consumer education requirements be extended to encourage or require cable operators to produce and carry compatibility education programs, to provide such programs to governmental access channel operators and to refer their subscribers to educational information through announcements in their billing statements.

68. TCI requests that we specify that cable systems electing not to offer their subscribers the option of renting a remote control do not have to comply with the remote control provisions of the consumer education requirements. In this regard, TCI observes that pursuant to new Section 624A(c)(2)(E) of the Communications Act of 1934, as amended, cable systems will *not* be allowed to disable the remote control capability of their set-top devices. It observes that cable systems could provide remote control capability, and indeed most will have to because most models of set-top boxes incorporate that capability, and also choose not to rent remote controls.

69. The commenting parties universally argue that the proposed requirement for cable operators to list all of the specific models of commercially available remote controls that are compatible with their set-top devices and specific vendors of those devices is too burdensome. Many parties state that with literally hundreds of models of remote controls on the market, it is simply not practical to expect that accurate lists of compatible remote controls can be compiled or that such lists would remain accurate for any length of time. They also point out that it would be difficult to identify merchants carrying compatible remote control units and to determine relevant market areas. NYC notes that in a city like New York, a list of retailers that carry compatible remotes would be extremely long and would be subject to constant revision. Media General Cable of Fairfax County, Inc. (Media General) argues that local retailers can adequately communicate the availability of their products to consumers themselves.

70. The commenting parties suggest a number of alternative approaches for informing cable subscribers about the availability of compatible remote controls that are intended to minimize the burden of this task. The CAG recommends that cable operators be required to provide information explaining the different types of remote controls that are compatible with its set-top boxes and to compile and distribute lists that show the names and telephone numbers of remote control manufacturers and/or marketers. It also recommends that cable operators be required to supply subscribers periodically with the manufacturers and model numbers of the set-top devices they supply. The CAG and Greater Media further state that a good faith omission of a particular manufacturer should not expose a cable operator to legal liability. CVI, Continental, Media General, SMCTC and TCI suggest that we require cable operators to inform subscribers of the manufacturers and model numbers of the equipment they employ and advise them that compatible remote controls may be available from retail suppliers. TCI also proposes that the mailing encourage subscribers to contact the cable operator to ask about the compatibility of a particular device they might be considering.

71. We continue to believe that a requirement for cable operators to provide their subscribers a consumer education program at regular intervals is necessary and desirable to inform subscribers of compatibility issues and solutions and to advise them of the availability of set-top converters and remote control units from third parties, as required by Section 17 of the 1992 Cable Act. While we find that our proposed plan for the consumer education program is generally appropriate for these purposes, the final requirements we are adopting include a number of modifications in response to the submissions of the commenting parties. Accordingly, we are adopting our proposed consumer education program with the modifications and clarifications indicated below.

72. First, in response to the concern expressed by CVS, we are clarifying that the requirement to advise subscribers of the availability of set-top devices from retailers applies only to basic converters without descrambling or other access control functions. This is consistent with our position, as discussed above, that we do not believe it is desirable to require cable operators to make their security technology available for ownership by the public. Consistent with the requirements for cable operators to offer subscribers supplemental equipment for improving compatibility, cable operators will also be required to advise their subscribers that supplemental equipment for improving compatibility may also be obtained from retail

outlets.[42] In response to Greater Media's request regarding a caution to subscribers about changes in the operation of remote controls if the cable operator changes set-top boxes, we note that, as indicated above in paragraph 63, we are prohibiting cable operators from changing the infrared codes used to operate the remote control capabilities of the set-top devices they employ. Thus, subscribers will not need to be cautioned about loss of use of their remote controls in such cases.

73. We find that, except as discussed below, the basic structure and content of our proposed consumer education program provides an appropriate balance between the need to properly inform cable subscribers about matters of compatibility and the burden the requirements impose on cable operators. We therefore are not extending the consumer education requirements to include the additional elements suggested by NYC. In response to TCI's request, we are clarifying that cable systems that elect not to offer their subscribers the option of renting a remote control will still have to comply with the remote control provisions of the consumer education requirements. Although Section 17 only refers to systems that rent remote controls, we nonetheless conclude that the interests of ensuring compatibility necessitate that the consumer education provisions regarding remote controls apply to all cable systems that employ subscriber equipment that is capable of being remotely controlled. We also wish to clarify that the requirement for the consumer information program to be provided to subscribers annually does not necessitate that the information be provided to individual subscribers on the anniversary of the date they first subscribed to the service. This requirement may be satisfied through a once-a-year mailing to all subscribers.

74. We are persuaded that the proposed requirements for cable operators to list all of the models of commercially available remote control devices that are compatible with their set-top devices and vendors that carry those models would, in fact, be impractical and overly burdensome. We therefore are adopting a revised plan that will provide adequate information to cable subscribers about the availability of compatible remote control units while minimizing the burden on cable operators of providing that information. The revised plan is a composite of all the alternatives discussed above. Under this plan, cable operators that employ subscriber equipment that is capable of being remotely-controlled will be required to include in their consumer education program a written notification that subscribers may purchase from other sources a remote control unit that is compatible with the set-top devices. They will also be required to identify the models of set-top devices they provide to their subscribers and to include a representative list of the remote control units currently available from retailers that are compatible with the set-top devices they employ. Cable operators will be required to make a good faith effort in compiling the list of currently available compatible remote controls; they will not be held accountable for inadvertent omissions. We are not requiring cable operators to list local retailers that carry compatible remotes. Rather, we encourage cable operators and their industry associations to coordinate with the suppliers of their set-top devices and the consumer electronics industry to compile lists of compatible remotes. These lists will be required to be current as of no more than six months before the yearly mailing of consumer information. Finally, cable operators will be required to encourage subscribers to contact the cable operator to ask whether a particular remote control unit would be compatible with the subscriber's set-top box.

75. *Implementation of Rules for Existing Equipment.* In the *Notice*, we indicated that it appears that the rules for improving compatibility between cable system and consumer equipment can be implemented relatively quickly. We therefore proposed to make these requirements effective six months after we adopt final rules for equipment compatibility.

76. The commenting parties generally agree that these rules can be implemented in the time period proposed in the *Notice*. The CAG and Time Warner also recommend that we permit scrambling of basic signals that was occurring as of December 1, 1993, when the *Notice* was released, to continue pending the adjudication of waiver requests filed in a timely manner. The CAG further states that an exception needs to be made regarding provision of dual-tuner set-top devices by cable systems. The CAG submits that some cable box manufacturers do not yet have such products available and that it may take an additional 12 months before this equipment can be expected to be generally available. It suggests allowing an 18-month period before requiring cable systems to provide dual-tuner set-top boxes.

77. We conclude that the rules for existing equipment generally can be implemented expeditiously, that is, within six months, without imposing substantial burdens on cable operators. These requirements can be met with existing models of supplemental equipment, minor reconfigurations of, or software changes to, existing cable facilities and preparation of relatively brief texts and lists of equipment to inform cable subscribers about compatibility problems and how they can be resolved. Accordingly, the compatibility rules for existing equipment will be effective October 31, 1994. We are, however, providing several exceptions to this schedule. First, we are making the prohibition on scrambling of signals carried on the basic tier of service effective July 31, 1994. We believe that this approximately three month period is an adequate amount of time for cable systems to alter their operations or construction plans to comply with the scrambling prohibition. In accordance with the information provided by the CAG, we will also delay implementation of the requirement for cable operators to provide set-top devices with multiple tuners until October 31, 1995. We advise cable operators that the requirements for other items of supplemental equipment will become effective on the six-month schedule. We also find that it will not be difficult for cable systems to comply with the requirements to allow their set-top devices that incorporate remote control capability to be operated with subscriber-owned remote controls. The requirement for cable system operators to allow their set-top boxes to be operated with subscriber-owned remote controls therefore will become effective May 31, 1994.

[42] This notification requirement will not apply to hardware used only to control signal access, *e.g.*, set-top boxes with multiple descramblers.

Rules for New Equipment

"Cable Ready" Consumer Equipment Standards

78. *Definition of "Cable Ready" Equipment.* In the *Notice*, we proposed to require that all consumer electronics equipment marketed as "cable ready" or otherwise marketed as intended for connection directly to cable service comply with the new "cable ready" equipment standards.

79. The CAG, Sharp Electronics Corporation (Sharp) and Zenith submit that the proposed definition of "cable ready" equipment is too broad. In statements representative of their position, the CAG indicates that the inclusion of "equipment otherwise marketed as intended for connection directly to cable service" in the definition would preclude consumers from having access to products that are capable of being connected to cable service, but which are not claimed to be "cable ready" as defined in the rules. It argues that the consumer electronics industry should remain free to manufacture and market, and consumers should be free to purchase, products that have none, or only some, of the characteristics to be required of "cable ready" sets. Zenith states that TV equipment that can tune most or all of cable channels, but does not include the other features required under the "cable ready" standard, is needed to continue to serve millions of consumers with a low cost product. The CAG recommends that we simply apply the new standards to those products which are expressly claimed to be "cable ready" or for which the same claim is made using substantially the same language.

80. On the other side, Cox Cable Communications and Newhouse Broadcasting Corporation (Cox), the Joint Cable Commenters and TCI believe that we should require all TV receivers and VCRs that can tune cable channels to comply with the technical standards for "cable ready" equipment. This would prohibit the marketing of consumer TV equipment with an extended tuning range that does not conform to the "cable ready" requirements. These parties argue that the inclusion of tuning capability beyond the broadcast channels in a TV receiver or VCR is tantamount to implying that the device is meant for connection to cable service. As an alternative to prohibiting equipment that has an extended tuning range but does not fully comply with the "cable ready" standards, the Joint Cable Commenters suggest that we require such equipment be labeled to warn potential purchasers that it may not operate properly when connected directly to cable service.

81. TCI and Time Warner believe that we should adopt point-of-sale notification and labeling requirements for the consumer electronics industry to advise consumers of potential compatibility problems that may occur if a "non-cable-ready" TV set or VCR is connected directly to cable service. They state that consumer education by cable operators will do little good if the TV receiver or VCR experiencing a problem was purchased by a consumer who was not properly informed of possible problems at the point-of-sale. TCI therefore recommends that we require that, prior to purchase, consumers be notified that some features of a "non-cable-ready" TV or VCR may not work or may not be necessary if the unit is connected to a cable system, and that they be encouraged to consult their local cable operator for further information. TCI also suggests that we require that "non-cable-ready" consumer TV equipment be labeled to indicate the tuning range of the device and to inform consumers that certain features of the device may not be compatible with some of the services they may choose to purchase from cable operators. It further proposes that we require manufacturers of third-party remote controls to list on a unit's packaging the cable set-top devices with which it is compatible.

82. We agree with the CAG, Sharp and Zenith that our proposed application of the "cable ready" equipment standards would be too broad. We do not believe it is desirable, from the standpoint of either consumers or manufacturers of consumer electronics equipment, to preclude marketing of consumer TV equipment that has some, but not all, of the characteristics of "cable ready" equipment. For example, a TV receiver that has the capability to tune some or all of the cable channels but is not equipped with a Decoder Interface connector or enhanced receiver performance features may be satisfactory for many consumers. In this regard, we observe that not all consumers are affected by equipment compatibility problems and that others may be satisfied with resolving such problems through use of supplemental equipment. Similarly, not all consumers will be affected by emissions ingress and egress problems as a result of connection of their TV equipment directly to cable service. In such cases, consumers should not have to bear the added cost of equipment that provides full compatibility when they do not need it. We therefore will apply the technical standards for "cable ready" consumer electronics equipment only to devices specifically marketed as "cable ready" or "cable compatible."[43]

83. We nonetheless are concerned that simply limiting the applicability of the "cable ready" standards in this manner and allowing all other products that have varying features intended to enhance their suitability for use with cable service could lead to confusion for consumers about the extent to which the products that are available to them in the market are compatible with cable service. To differentiate "cable ready" products from other products with features intended for use with cable service, we are requiring that consumer TV receivers and VCRs that incorporate features intended to be used with cable service but do not fully comply with the "cable ready" standards be labeled with an advisory that appears on the device and on its packaging. This advisory shall indicate that the product does not fully comply with the FCC's requirements for cable compatible equipment. As a corollary, the new rules also provide that equipment that does not comply with the "cable ready" standards may not be marketed with terminology that describes the device as "cable ready" or "cable compatible," or that otherwise conveys the impression that the device is *fully* compatible with cable service.

84. We are not extending the labeling and advisory requirements to remote control units. These units are not subject to requirements that they have the capability to command cable set-top devices and therefore may not be intended for use with a cable set-top device. We also be-

[43] We consider the terms "cable ready" and "cable compatible" to be equivalent and interchangeable. Consistent with the provisions of Section 624A(c)(2) of Section 17 of the 1992 Cable Act, *supra*, the new technical standards adopted herein will apply to consumer electronics equipment marketed as "cable ready" or "cable compatible."

lieve that consumer electronics manufacturers will have an incentive to advise consumers of which, if any, set-top devices their remote controls are able to command.

85. *Channel Tuning.* In the *Notice*, we proposed to require that "cable ready" TV receivers and VCRs have the capability to tune all cable channels over a frequency range of 54 MHz to 1 GHz in accordance with the cable channel identification plan specified in the new EIA IS-132 standard developed by the JEC.[44] We also requested comment on whether it might be desirable to provide a "migration plan" to full 1 GHz tuning capability that would first require cable channel tuning capability somewhat lower than 1 GHz, such as 750 MHz, and then later require full 1 GHz capability.

86. The commenting parties addressing this issue support the use of EIA IS-132 as the standard channel plan for cable service and the tuning standard for "cable ready" TV receivers and VCRs. They generally agree that use of this plan will minimize the need to use set-top converters for tuning purposes. These parties differ, however, with regard to their views on the upper frequency to which "cable ready" equipment should be required to tune. The CAG recommends that "cable ready" consumer equipment be required to tune to 800 MHz, rather than 1 GHz. In support of the CAG's position, Zenith states that a requirement to tune to frequencies higher than 800 MHz would be unnecessary with the vast majority of cable systems in view of the trends in technology towards digital compression, which reduces the need for cable systems to use higher frequencies. Zenith also submits that a higher minimum upper tuning requirement would add to the cost of consumer electronics equipment. It submits that the tuning range requirement could be increased in the future if appropriate. CVI recommends that "cable ready" equipment be required to tune frequencies up to 750 MHz and that devices with digital and/or HDTV capability be able to tune channels up to 1 GHz. CVS, Mitsubishi, NYC, SMCTC and TCI believe that all new TV receiver equipment should be capable of tuning up to 1 GHz to avoid the renewed use of set-top converters when cable systems are inevitably built to operate up to that frequency. Mitsubishi believes that no migration path to the higher frequency range is needed. NYC states that a migration plan would only serve to confuse consumers.

87. GI submits that it is possible that digital transmission channels might use a bandwidth larger or smaller than 6 MHz and that we therefore should apply the EIA IS-132 channel plan only to analog video signals. TCI submits that while it supports a 1 GHz tuning requirement, it believes the best solution would be to require "cable ready" TV receivers and VCRs to incorporate modular tuners. It states that adding modularity to consumer equipment would protect consumers from premature obsolescence caused by the unsynchronized cycles of the cable and consumer electronics industries.

88. Bell Atlantic submits that use of frequencies below 54 MHz is feasible for cable service and that use of these frequencies may be preferable for digital video services. It suggests that we extend the lower range of the channel tuning capability of consumer electronics equipment to include the 5 to 54 MHz frequency band.

89. We continue to believe that adoption of the EIA IS-132 channel plan as the standard cable television channel plan will further compatibility between cable systems and consumer TV receivers and VCRs. As noted by the commenting parties, adherence to this standard will minimize the need to use set-top converters for tuning purposes. This standard also provides channels across all frequencies from 54 MHz up to 1 GHz and beyond and is consistent with the channel plan currently used by most cable systems. We concur with the CAG and Zenith that 800 MHz seems adequate as the minimum required upper tuning frequency for cable channels. In this regard, we agree with Zenith that 800 MHz is an appropriate choice for this standard in light of expectations for the upper range of frequencies that will be used by cable systems and the fact that a higher tuning requirement would unnecessarily add to the cost of consumer TV sets and VCRs. In considering 800 MHz as the minimum upper tuning requirement, we also observe that currently all TV broadcast receivers are required by our rules to be capable of receiving all channels allocated to the television broadcast service. Under this requirement, TV receivers are required to tune up to and including UHF channel 69, or 800-806 MHz. Inasmuch as TV receivers normally incorporate a single tuner for both cable and broadcast channels and the appropriate upper range for cable is essentially the same as the existing broadcast tuning requirement, we believe it would be appropriate to adopt the minimum tuning range for broadcast channels as the upper cable channel tuning requirement for "cable ready" equipment. Accordingly, we will require "cable ready" TV receivers and VCRs to tune to cable channels specified by the EIA IS-132 standard up to a minimum frequency range of 806 MHz. We will, of course, monitor developments in this area and take appropriate action in the future to alter the minimum tuning range requirement for "cable ready" equipment if necessary.

90. New "cable ready" consumer TV equipment will not be required to use the EIA IS-132 channel plan for reception of digital signals. As discussed below, we will consider an appropriate channel plan for digital cable service in the context of our future proceeding on cable digital cable transmission standards. We also do not believe it is desirable to require that "cable ready" TV receivers and VCRs incorporate modular tuners. While manufacturers will have discretion to include modular tuners as features of new equipment, we do not find that there is sufficient likelihood that an alternative channel plan to EIA IS-132 will arise to warrant requiring modular tuners in "cable ready" consumer equipment. Finally, we see no indication that cable services will be provided on channels in the

[44] The new channel plan is an amended version of the former EIA/ANSI IS-6 channel plan. This new standard is known as the Electronic Industry Association's "Standard Cable Television Channel Identification Plan, IS-132, May 1994" (EIA IS-132). We note that EIA/ANSI IS-6 accommodates full 1 GHz cable operation and that the new, amended channel plan maintains the former channel allocations for frequencies up to 1002 MHz. The new EIA IS-132 channel plan specifies frequency slots and assigns each a number for frequencies up to 1002 MHz and specifies a methodology for creating additional channels at higher frequencies. For example, a 1 GHz system using the new plan, would operate between 54 and 1002 MHz and would have the potential for 158 active channels. The CAG points out that EIA IS-132 does not require cable systems to deliver, or TV equipment to tune, any particular number of channels.

frequency range 5 to 54 MHz. We therefore will not extend the tuning standard for "cable ready" equipment to this area of the spectrum.

91. *Receiver Performance Standards.* In the *Notice,* we proposed various technical performance standards for "cable ready" consumer electronics equipment. These proposals were designed both to ensure proper operation of "cable ready" TV receivers, VCRs, and other consumer TV equipment with cable service and to prevent such equipment from causing interference to cable systems. In particular, our proposals included technical standards to protect "cable ready" TV receivers and VCRs against adjacent channel interference, tuner overload and direct pickup of undesired signals. We also proposed standards for consumer electronic device signals conducted onto the cable system, radiated emissions, input selector switch isolation and by-pass switch attenuation. The CAG submitted detailed comments on the proposed technical standards that include suggestions for several changes to the proposed standards and measurement procedures.[45] CAG indicates that the technical standards it recommends for "cable ready" equipment are the result of a consensus agreement among the consumer equipment manufacturers and cable system operators. We are according CAG's comments considerable weight since they generally appear to be based on sound engineering analysis and to represent an industry consensus. Each of the various elements of the new technical standards are discussed below.

92. *A. Adjacent Channel Interference.* To reduce interference from signals on adjacent channels, we proposed to require that "cable ready" equipment not exceed a criterion of "just perceptible" interference to the desired signal from an adjacent channel signal whose visual carrier level is 3 dB above the visual carrier level of the desired signal.[46] We also requested comments on alternate test methods that do not rely on subjective observations of the television display.

93. The CAG indicates that, although adjacent channel performance is a combined response to lower and upper adjacent visual, chroma, and aural signals, industry experience has shown that interference from the lower adjacent aural carrier predominates. CAG also notes that, in practice the aural carrier of TV signals carried on cable systems is generally between 10 and 17 dB below the visual carrier signal level. Therefore, it believes that a standard based on a single unmodulated interfering carrier located 1.5 MHz lower in frequency and 10 dB lower in signal level than the visual carrier of the desired NTSC channel is sufficient to achieve our goal of adequate adjacent channel performance. In addition, the CAG recommends that we evaluate compliance through objective measurements made at the TV receiver IF output port rather than subjective observations of "just perceptible" interference. Specifically, CAG submits that a 55 dB suppression ratio, as measured at the unfiltered IF output port of the television receiver, would be equivalent to "just perceptible" interference and therefore would be appropriate.

94. We find that CAG's statements and recommendations regarding the adjacent channel performance standard are technically sound. We agree with the CAG's position that measurement of lower adjacent channel interference will provide an adequate indication of the adjacent channel performance of a "cable ready" television receiver. Further, we find that the standard proposed by the CAG is generally equivalent to our proposal and will provide sufficient adjacent channel interference protection. We also observe that the CAG's proposed measurement method would be more accurate and reliable than our proposed method because it is based on objective, rather than subjective, tests. Objective testing would also be less burdensome for manufacturers, since these tests can be automated easily. Accordingly, we are adopting the standard and testing methods suggested by the CAG.

95. *B. Tuner Overload.* To avoid tuner overload, we proposed to require that the tuners of "cable ready" consumer devices suppress distortion products on any frequency in the desired channel at least 55 dB below the visual carrier.[47] We also invited recommendations for a measurement procedure. The CAG proposes a procedure for measuring tuner overload and, based on this procedure, recommends that we require 51 dB suppression rather than 55 dB. It further recommends that the standard apply only for signals up to 750 MHz.

96. The CAG's proposed test method calls for measuring the amplitude of spurious signals falling within the 6 MHz wide unfiltered IF relative to the amplitude of any tuned carrier. The CAG suggests that measurements be performed with a test signal that exposes the RF input of a "cable ready" television receiver to a comb of unmodulated carriers. The individual unmodulated carriers would have amplitudes of +15 dBmV and be located at all possible visual carrier frequencies in the standard plan delineated in the EIA IS-132 standard. The CAG states that the +15 dBmV amplitude for the unmodulated carriers corresponds to the maximum amplitude of signals carried on cable signals. It also states that the comb of CW signals is appropriate for this test due to the mixing that can occur with multiple signals carried simultaneously on cable systems. The CAG believes it would be appropriate to require 51 dB suppression of distortion products with this test procedure, rather than our proposed 55 dB standard, because the average power levels of normal NTSC television signals is 6 dB lower than the CW carriers used for the measurements.

97. The CAG believes that the upper limit of the comb test signal should be 750 MHz because digital, rather than analog signals, will likely be used in cable systems that operate above this frequency. It states that the signal strength of digital transmissions is likely to be lower than NTSC analog transmissions by 5-10 dB. It further submits that digital signals will be more benign because the visual effect is more like a slight increase in noise rather than a discernable beat pattern in the picture. CAG also believes

[45] The CAG asked Working Group II (WGII) of the JEC to examine tuner performance specifications and the specific tuner performance criteria proposed in the *Notice*. A copy of WGII's comments and recommendations was appended to CAG's comments. CAG states that the comments and recommendations of WGII represent a consensus of the both the cable television and consumer electronics industries.

[46] A 3 dB higher adjacent channel signal corresponds to the variation in adjacent channel signals permitted under Section 76.605(4)(i) of our rules, 47 C.F.R. §76.605(a)(4)(i).

[47] Tuner overload results from the presence of many strong signals that interact and degrade the performance of the receiver.

that if analog signals are used at these higher frequencies, they will be attenuated much more than lower frequency signals due to the differential loss in the drop cable.

98. We find that the test method suggested by the CAG is an adequate and appropriate means for measuring tuner overload performance. We are not persuaded, however, that the suppression level for distortion products should be 51 rather than 55 dB. The CAG's suggested test method initially provides for input test signals that are 5 dB lower than the maximum limit of the amplitude of individual visual carriers (+20 dBmV) for cable systems specified in EIA Draft Standard IS-23.[48] Accordingly, we are adopting our proposal that the tuners of "cable ready" consumer equipment suppress distortion on any frequency in the desired channel products at least 55 dB below the visual carrier. We generally accept CAG's argument that tuner overload need not be tested at higher frequencies. However, we will require testing up to 806 MHz, rather than CAG's proposal of 750 MHz, because this corresponds to the required tuning capability of "cable ready" TV receivers and VCRs.

99. *C. DPU Interference.* To address direct pick-up (DPU) interference, we proposed to require that "cable ready" equipment not exceed a criterion of "just perceptible" interference in the presence of a 100 mV/m field generated by a CW source. The CAG suggests an alternative standard that employs measurements of interfering signal levels at the TV receiver IF referenced to specific carrier-to-interferer ratios, rather than subjective observations of "just perceptible" interference. Under the CAG's proposed test method, the receiver under test would be exposed to an external ambient radio frequency field whose amplitude is 100 mV/m and whose frequency is 2.55 MHz above the visual carrier of the channel to which the receiver is tuned. Tests would be performed with the receiver tuned to each of six EIA IS-132 television channels (two each in the low VHF, high VHF and UHF broadcast band) whose individual RF levels are 0 dBmV. Susceptibility measurements would be made by rotating the unit under test 360 degrees until the maximum response in the unfiltered IF passband is obtained. The CAG recommends that with this measurement procedure, we require suppression level on each test channel, as measured at the unit's IF output terminals, to be at least 45 dB below the response of the desired channel, *i.e.*, a 10 dB reduction from the -55 dB proposed reference level. It further recommends that we require that the average of the suppression obtained for all of the channels tested be at least 50 dB, *i.e.*, a 5 dB reduction. At frequencies between 800 MHz and 1002 MHz, in the case of equipment designed to tune in that range, the CAG suggests that tests be performed on six EIA IS-132 channels spaced approximately equally throughout the band. It recommends that the required suppression in this range be at least 35 dB on each individual channel and at least 40 dB for the average suppression of all channels measured.

100. The CAG believes that its proposed standard and measurement criteria are consistent with our proposed performance criteria. In recommending requirements for suppression ratios that are less than 55 dB, the CAG submits test data indicating that susceptibility is strongly dependent on receiver orientation. It observes that, in conditions of actual use, receivers will be oriented randomly with respect to external fields, so that the average susceptibility will certainly be less than the tested maximum. It also states that the 100 mV/m external ambient field was based on signals present outdoors and does not take into account the average attenuation effects of buildings and other structures.

101. CVI believes that it would be more appropriate to use 250 mV/m as the maximum external ambient field strength for measuring DPU performance. In support of this proposal, CVI submits field intensity data measured in five communities. It claims that these measurements, which were made outdoors, show that the field intensity was greater than 250 mV/m in 19 percent of the samples and greater than 100 mV/m in 85 percent of the samples. CVI acknowledges, however, that some additional signal attenuation will occur due to structural shielding. It further states that although none of its submitted data included measurements made on UHF stations, it believes that field intensities from UHF stations tend to be higher than VHF stations. CVI believes this evidence supports a 250 mV/m field intensity for the DPU performance standard. In its reply comments, Zenith states that protecting consumer TV equipment against DPU in the presence of 250 mV/m external ambient field would not be technically practicable and is beyond what is economically justifiable in light of any potential advantage for consumers. SMCTC concurs with our proposal for DPU above 54 MHz, but recommends the requirements include a 3 volts/m immunity standard below 30 MHz to protect against AM broadcast stations, Amateur Radio and Citizens Band stations which all could be in close proximity to cable subscriber.

102. We agree with the CAG that the direct measurement of DPU interference at the TV receiver IF is preferable to subjective measurements based on "just perceptible" interference. We further agree with the CAG that, given the directional variation in receiver DPU performance, it is appropriate to establish standards for both individual channel DPU performance and the average of DPU performance for all measured channels. We also find the less stringent performance standards suggested by the CAG are appropriate in light of the fact that signal levels outdoors can be expected to be attenuated by walls and other structural components at indoor locations. The average susceptibility of the receiver in the home will in all probability be less than that determined under the proposed test method.

103. While we recognize that ambient external fields may sometimes exceed 100 mV/m, as CVI indicates, we nonetheless agree with the CAG that 100 mV/m is the appropriate standard to specify for the level of the external ambient field. In this regard, we are concerned that a more stringent standard might result in significantly higher prices for "cable ready" equipment that would discourage consumers from purchasing these units. We also find that the level of protection that would be provided under the standard suggested by the CAG would be a significant

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[48] *See* Electronic Industries Association "RF Interface Specifications for Television Receiving Devices and Cable Television Systems, EIA Draft Standard IS-23" (EIA IS-23). The specifications of this standard are used by the cable industry and consumer electronics manufacturers to provide an effective interface between cable service and consumer electronics equipment that are intended for connection to cable service. EIA IS-23 provides that the maximum visual carrier level of individual signals carried on a cable system should be not more than +20 dBmV.

improvement over the current DPU performance of consumer TV receivers and VCRs. The 100 mV/m level for external ambient field strength provides an appropriate balance of the competing concerns of the equipment cost and DPU protection. We also recognize CVI's point that field intensities in the UHF broadcast band may be somewhat higher than VHF. However, UHF fields also suffer greater attenuation through walls and other structural components. We therefore are not adopting different standards for ambient fields on UHF frequencies. We also are not adopting SMCTC's proposal to extend the DPU standards adopted herein to frequencies below 54 MHz, as this area of the spectrum is not within the tuning range of receivers being considered in this proceeding. Accordingly, we are adopting standards to protect against DPU interference on "cable ready" consumer electronics equipment and associated test methods as suggested by the CAG. The standards we are adopting will require measurement of DPU performance of "cable ready" equipment on frequencies up to 806 MHz, in accordance with our decision to specify 806 MHz as the minimum upper tuning range for "cable ready" equipment.

104. *D. Image Channel Interference.* In the *Notice*, we indicated that it was our belief that consumer equipment that complies with the DPU ingress standard would also be less likely to experience interference from both cable and off-the-air signals on the "image frequencies," *i.e.*, frequencies that are removed 14 and 15 channels from the desired channel. The CAG states that when conventional 45 MHz IF frequencies are used in receivers along with high-side local oscillator (LO) injection, the receiver will have a potential response to the 15th higher channel on the system regardless of the DPU shielding provided. The CAG further states that image channel response is primarily a function of the internal circuitry design of the receiver, not the external shielding efficiency, as both desired and image channels are received on the same cable. Thus, it believes that separate requirements are needed for image channel performance.

105. The CAG suggests that receivers whose conversion frequencies are such that a potential image frequency falls within the cable system bandwidth should be required to reject the image signal by at least 60 dB from 54 MHz up to and including 750 MHz. In this case, the CAG's recommended suppression is 5 dB more stringent than the 55 dB equivalent of "just perceptible" interference. The extra 5 dB is intended to provide for the variations in cable system signal levels that are permitted in a 1 GHz bandwidth system under Part 76 of our rules.[49] Although Part 76 allows a maximum variation of 17 dB in a 1 GHz system, the CAG contends that in a well-maintained cable system, the variation over approximately 90 MHz (15 channels) will be considerably less. From 750 MHz up to and including 1002 MHz, the CAG recommends a minimum of 50 dB rejection. The CAG's relaxed specification at higher frequencies reflects its previously stated position that these frequencies are likely to be used for low amplitude digital signals.

106. We agree with CAG's position that an image rejection performance standard is needed for consumer equipment sold as "cable-ready." In this regard, we are persuaded that DPU specifications will not prevent image problems in consumer equipment. We also agree that, in order to allow for variations in cable signal levels permitted under Part 76 of our rules, a standard that is 5 dB more stringent than the equivalent of "just perceptible" interference is justified for this standard. The CAG's recommendation for reducing the image channel suppression standard for frequencies above 750 MHz also appears reasonable in light of the expectation that signals on frequencies in this range will be of relatively lower amplitude. Further, to be consistent with our decision on the minimum upper tuning requirement for "cable ready" equipment, upper limit of the image rejection standard will be 806 MHz. It seems reasonable to extend this limit from 750 MHz up to the upper tuning range limit. Accordingly, we are requiring that "cable ready" equipment suppress image signals by at least 60 dB from 54 MHz up to and including 806 MHz.[50]

107. *E. Conducted Emissions.* In the *Notice*, we proposed to require that the level of RF emissions conducted onto a cable system by a "cable ready" consumer device be no more than -37 dBmV, referenced to 75 ohms, over the frequency range 54 MHz to 1002 MHz. The CAG believes our proposed conducted emissions limit is too stringent. It argues that our proposal is based on worst case conditions that are not likely to occur and fails to take into account variations in the factors that cause conducted interference. For example, it notes that our proposed limit assumes that the cable subscriber is receiving the minimum signal level of 0 dB required under our rules. The CAG submits that in most cases the signal delivered to the subscriber is considerably stronger. It observes that we also assumed that the cable system provides the minimum isolation between subscriber drops required under the rules. It submits that in most cases greater isolation is provided. The CAG further notes that there is considerable variability in the levels and the frequencies at which internally generated emissions are produced in equipment. It states that this fact should be weighed against the low probability that other near-by cable subscribers will be tuned to a channel receiving the interfering emissions. The CAG therefore argues that it is likely that most conducted emissions from consumer TV equipment will be well below the proposed -37 dBmV limit. The CAG also claims that manufacturers will design their products with sufficient compliance margin to account for variations in performance across production units.

108. The CAG recommends that we adopt two different standards for conducted emissions: one for emissions caused by signals generated internally within the device and another for emissions caused by retransmission of signals introduced into the device from external sources. For conducted emissions caused by local oscillator emissions and other signals internally generated within the consumer's device, CAG proposes the following limits:

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[49] *See* 47 C.F.R. §76.605(a)(4)(ii).

[50] In testing for compliance with this standard, image rejection shall be the ratio of desired to undesired RF carriers measured within the IF passband of the receiver. The undesired signal shall be a CW carrier equal in amplitude to the desired channel visual carrier and located 90 MHz above the visual carrier frequency of the channel to which the receiver is tuned. The desired signal shall be an NTSC signal with visual carrier levels of 0 dBmV and +15 dBmV modulated with a 10 IRE flat field and an unmodulated aural carrier level that is 10 dB below the visual carrier level. Tests are to be conducted with the receiver tuned to ten evenly spaced channels specified in the EIA-542 channel plan.

From 54 MHz up to and including 300 MHz -26 dBmV

From 300 MHz up to and including 450 MHz -20 dBmV

From 450 MHz up to and including 1,002 MHz -15 dBmV

Devices would be required to comply with these standards on any frequency in the applicable ranges. Further, CAG proposes that in the band 450 MHz to 1002 MHz, in addition to allowing a -15 dBmV maximum level for any individual frequency, we require that the average of measurements made on six channels equally spaced in frequency be no greater than -20 dBmV. The CAG submits that its proposals for less stringent standards take the above factors into account. In addition, it states that the progressive relaxations in the standards with increasing frequency are based on the increased cable drop losses that occur at higher frequencies.

109. For conducted emissions caused by retransmission of external signals, the CAG recommends that we limit conducted signals on any frequency to less than -26 dBmV when the device is operated in an external ambient RF field whose frequency varies between 54 MHz and 1002 MHz and whose field strength is 100 mV/m. CAG states that the same considerations that underlie its proposal that we specify -26 dBmV as the standard for conducted emissions caused by internally generated signals also apply in the case of conducted emissions induced by external sources.

110. GI supports the CAG's proposal for conducted emissions standards. CVI agrees with the CAG that the proposed limit is more stringent than necessary for TV receivers and VCRs with double conversion tuners that generally have their local oscillator above the highest frequency the units are capable of tuning. However, for single conversion tuners, which typically have their local oscillator 45.75 MHz above the tuned channel, CVI supports the *Notice's* tighter standard of -37 dBmV. Greater Media and CVS, with support from the Joint Commenting Parties and SMCTC, argue that the we should extend the frequency range of the conducted emissions standard down to 5 MHz. These parties state that cable systems are beginning to operate two-way transmission technologies that use frequencies between 5 MHz and 30 MHz for subscriber return signals which need protection from conducted emissions produced by subscriber equipment.

111. We agree with CAG that the worst case conditions that underlie the proposed conducted emissions standard are not typical of cable system operation and that the proposed standard therefore would be unnecessarily protective and too burdensome for consumer equipment manufacturers. We also concur with the CAG that less stringent limits on conducted emissions in accordance with its plan for internally generated emissions, as indicated above, would be appropriate to minimize interference from consumer equipment in light of the operating characteristics of a typical cable system and the fact that losses through cable drops increase with frequency, and therefore provide additional attenuation between subscribers. As losses through drop cables will affect both internally generated and externally induced interference signals, we will apply the same standard for conducted emissions irrespective of whether the source of the conducted signal is internal or external.

112. Different test methods are needed for internal and external sources of conducted emissions. In this regard, we are specifying that measurements for conducted emissions caused by internal sources are to be made with the device operating in a shielded room. Since the RF ingress methods and sources will be the same as in the case of DPU interference, measurements for conducted emissions from external sources will be made when the device is operated in an external ambient RF field whose field strength is 100 mV/m, following the same test conditions to be used in measuring receiver DPU.

113. We disagree with CVI that it would be appropriate to apply different conducted emissions standards based on the type of frequency conversion employed in the tuner of a device. We recognize that a device with a double conversion tuner incorporating an IF outside the frequency range of cable system operation could be expected to produce lower levels of conducted emissions in the applicable ranges of the standards. However, if such a device were, in fact, to generate high levels of conducted emissions, whatever their source, those emissions would have the potential to cause the same harm to other subscribers of the cable system as emissions from a device with a standard tuner. We also are not persuaded that we should extend the applicability of the conducted emissions standard to frequencies below 54 MHz, as suggested by Media General and CVS. These parties have not provided any information showing that there is a real risk of interference to cable system operation from conducted emissions in this frequency range. It is not likely that conducted emissions from consumer equipment will be strong enough to interfere with subscriber return signals that are intended to reach the cable system headend. In addition, the standards we are adopting address an entirely different interference scenario, *i.e.*, interference from one subscriber to another, not interference from a subscriber to cable return transmission signals. Accordingly, we will not adopt a limit on conducted emissions below 54 MHz.

114. *F. Radiated Emissions.* In the *Notice*, we proposed to require that "cable ready" units be tested to comply with the existing Part 15 limits on radiated emissions from unintentional radiators when connected to cable service.[51] We proposed to require that compliance be demonstrated with input signals on six cable channels distributed evenly over the frequency range of 54 MHz to 1002 MHz and with the signal level of the input cable signal varied from 0 to 25 dBmV. We asked for comment as to whether such tests should be required over the entire range from 0 to 25 dBmV, or whether testing only at the two extremes would suffice. We also proposed to apply these performance and testing requirements to cable system terminal devices (CSTDs).[52]

[51] The Part 15 emissions limits that apply to consumer TV equipment are set forth in Section 15.109(a) of the rules. *See* 47 C.F.R. §15.109(a). The tests for radiated emissions when connected to a cable signal would be in addition to the existing tests required for radiated emissions when connected to an antenna input. *See* 47 C.F.R.§15.31(n).

[52] Cable system terminal devices are TV interface devices that serve, as their primary function, to connect a cable system to a TV receiver or other subscriber premise equipment. *See* 47 C.F.R. §15.3. These devices are subject to the general Part 15 emissions limits for unintentional radiators, as set forth in Section 15.109(a) of the rules. *See* 47 C.F.R. §15.109(a).

115. As an alternative to our proposed use of the Part 15 radiated emissions limits, the CAG proposes that we employ the more stringent radiated emissions limits for cable systems specified in Part 76 of our rules as the standard for re-radiated emissions of cable signals by "cable ready" equipment.[53] It contends that signal leakages, whether from the cable plant or from receivers connected to that plant, are required to be within the limits set in Part 76, rather than Part 15. CAG also recommends a receiver input cable signal level of +15 dBmV for compliance testing. This corresponds to the maximum input level provided to subscriber equipment by typical cable systems. The CAG further suggests that, where a device is furnished with interconnecting cables, radiated emissions be measured with those cables attached in a normal configuration.

116. The Joint Cable Commenters support CAG's contention that Part 76 radiated emissions limits should apply to consumer equipment connected to a cable system. They also agree that measurements of radiated emissions should be made with an input signal level of +15 dBmV. SMCTC believes that our proposal to require testing on only six evenly spaced channels for radiated emissions testing is inadequate for determining compliance. It proposes that testing be conducted using a full complement of 158 potential cable channels.

117. While we agree with the CAG that application of the Part 76 emission limits to "cable ready" receivers may provide slightly greater assurance than the Part 15 limits that "cable ready" TV equipment does not cause harmful interference, we are not convinced that such a standard is necessary. As we observed in our previous decision to apply the Part 15 radiated emissions standards to CSTDs, the emissions characteristics of consumer TV receiving devices differ distinctly from those of a cable system distribution plant.[54] The Part 76 emission limits were designed to apply to open air cable installations where radiated emissions would not be attenuated significantly by surrounding structures. On the other hand, radiation from television receiving equipment, which are point sources, is subject to propagation losses that are greater than the cable system as a whole. Emissions by TV receiving equipment are also attenuated by the structure within which it is located. We note that CSTDs, which connect to cable systems and are currently allowed the higher emission levels of Part 15, have not been a threat to the operation of cable systems. We therefore find that it would be unnecessarily burdensome and costly to require manufacturers of "cable ready" TV receiving equipment to comply with tighter emission standards when their devices pose no greater threat than cable set-top boxes and other CSTDs. Accordingly, we are adopting our proposal to apply the radiated emission limits of Section 15.109(a) to "cable ready" consumer TV equipment.

118. We also find that a single input cable signal level of +15 dBmV, as suggested by the CAG, is appropriate for testing "cable ready" equipment for compliance with the radiated emissions standard, rather than a range of 0 dBmV to +25 dBmV. We therefore will require that a +15 dBmV NTSC signal be used as the input cable signal in testing for compliance with this standard. We are not adopting SMCTC's suggestion that we require radiated emissions tests to be performed with the device tuned to each of the cable channels the device is capable of tuning. Such testing would be burdensome for manufacturers and SMCTC has not provided any technical information or other grounds that would indicate the need for performing the test with a full complement of 158 potential cable channels. We therefore will require that compliance be demonstrated with input signals on six EIA IS-132 cable channels distributed evenly over the frequency range of 54 MHz to 1002 MHz.

119. *G. Input Selector Switch Isolation.* RF emissions can also leak from and/or enter into cable systems through input selector switches (also called A/B switches) used to alternate between service from a cable system, an antenna for reception of broadcast signals, or other equipment such as a VCR or videodisc player, if the switches do not provide adequate isolation between their various ports. Under the existing Part 15 rules, input selector switches used to alternate between cable and antenna service that are included in TV receivers and TV interface devices, such as VCRs and CSTDs, are required to comply with isolation standards.[55] In the *Notice*, we proposed to clarify that the input selector switch isolation standards would apply to all transfer switches used to alternate between a cable service and other inputs, including stand-alone units that are not part of a "cable ready" TV receiver or a TV interface device. We also noted that the input selector switch isolation rules currently are specified only for frequencies up to 550 MHz. In considering this issue, we recognized that it becomes more difficult to achieve high levels of isolation at higher frequencies and that the amount of isolation needed also decreases with increasing frequency. We therefore requested comment on the appropriate standard or standards to specify for the frequency range from 550 MHz to 1002 MHz to conform with cable service that might use channels up to this frequency range.

120. The CAG recommends that we only extend the isolation requirements for input selector switches used with cable service up to 800 MHz. It submits that switch isolation can be expected to deteriorate gradually above 800 MHz. The CAG further observes that TV antennas connected to an input selector switch are inefficient radiators above 800 MHz. It therefore suggests that we require input selector switches used with cable service to provide 55 dB isolation between ports in the frequency range 550-800 MHz. CVS supports extending the Part 15 isolation requirements to frequencies up to 1 GHz. NYC also supports extending the Part 15 isolation standards for input selector switches up to 1 GHz and applying these requirements to all selector switches, including stand-alone units. SMCTC believes that the current requirement for 60 dB should be extended from 550 MHZ up to 1002 MHz.

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[53] The radiated emissions standards for cable systems are set forth in Section 76.605(a)(12). These standards provide that radiated emissions on frequencies less than 54 MHz and over 316 MHz must not exceed 15 mV/m at 30 meters and that radiated emissions on frequencies over 54 MHz up to and including 216 MHz must not exceed 20 mV/m at 3 meters. *See* 47 C.F.R. §76.605(a)(12).

[54] *See Report and Order*, GEN Docket No. 85-301, 2 FCC Rcd 3304 (1987).

[55] *See* 47 C.F.R. §§15.115(c) and 15.117(h). These sections currently provide that transfer switches must provide 80 dB of isolation for signals in the frequency range 54 to 216 MHz and 60 dB for signals at frequencies from 216 to 550 MHz.

121. We continue to believe that it is necessary to extend the isolation requirements for input selector switches used with cable service to higher frequencies and to apply these requirements to all such switches, including stand-alone units. We also concur with the CAG that 55 dB isolation will provide adequate protection against leakage of higher frequency cable signals. We further recognize the difficulties inherent in designing economical switches that can provide a high degree of isolation at frequencies above 800 MHz and agree with the CAG that the broadcast receiving antennas connected to these switches can be expected to be less effective radiators above 800 MHz. In view of the expectation that cable systems generally will not use higher frequencies, there also does not appear to be a need to ensure that these switches provide significant isolation above the 800 MHz range. Accordingly, we are adopting a requirement that input selector switches used to alternate between cable service and an antenna provide 55 dB isolation between input ports over the frequency range 550 MHz up to and including 806 MHz.[56] We are also clarifying that isolation requirements for input selector switches used with cable service apply to all such switches, including stand-alone units.

122. *H. Attenuation of By-pass Switches and Other Devices.* In the *Notice*, we proposed to require that switches and other devices, such as filters that are intended to be used to bypass cable set-top devices or other equipment, not attenuate the input cable signals more than 6 dB at any output port. This proposal was intended to ensure that acceptable service is obtained when using supplemental equipment to improve compatibility between cable service and consumer equipment. The requirement would apply both to devices that are built into TV receivers and VCRs and to stand-alone bypass switches and filters.

123. The CAG and NYC support our proposal to establish a standard for attenuation at the output ports of by-pass switches. CAG also suggests that we allow a slightly higher limit for attenuation of signals on frequencies above 550 MHz. It recommends that attenuation be limited to 6 dB in the frequency range 54-550 MHz, and 8 dB in the range 550-1002 MHz. The CAG states that higher losses should be permitted at higher frequencies because component losses, plus cabling and possibly switching losses, generally increase at the higher frequencies. SMCTC, however, believes that the amount of attenuation through input selector switches should be no greater than 1 dB.

124. We find our proposed 6 dB attenuation limit is appropriate and adequate to ensure acceptable service through bypass switches and filters from signals on frequencies at and below 550 MHz. We also believe a slightly higher limit is appropriate for signals on frequencies above 550 MHz for the reasons indicated by the CAG. The 1 dB standard suggested by SMCTC is unnecessarily stringent for switches and inappropriate for splitters. While 1 dB attenuation may be an achievable performance level for some switches, a less stringent 6 dB standard will provide a margin for variations in design and production and still ensure that satisfactory signal levels pass through switches. We observe that non-amplified signal splitters, by their design, divide the input signal strength among two or more output ports, so that the signal levels at individual output ports generally will be substantially lower than the input signal. Accordingly, we will require that switches and other devices intended to be used to by-pass cable set-top devices (or the internal circuitry in such devices) and other equipment not attenuate input cable signals at any output port more than 6 dB for signals on frequencies at or below 550 MHz, or more than 8 dB for signals on frequencies above 550 MHz. These requirements will apply both to devices that are built into TV receivers and VCRs and to stand-alone units. We also wish to clarify that the limits that we adopt here do not apply to our procedure for the measurement of receiver noise figures, which allows 4 dB to be subtracted to allow for a signal splitter between the RF input connector of the receiver and the UHF tuner under test.

125. *Equipment Authorization.* In the Notice, we requested comment on whether we should subject "cable ready" television receivers and component descrambler/decoders to authorization under the notification or certification procedures, rather than the verification procedure to which these devices are currently subject.[57]

126. In its comments, the CAG states that television receivers have very good levels of compliance under the Commission's verification procedure. It therefore believes there is no need for the Commission to impose new burdens on manufacturers or itself by applying either of the more rigorous notification or certification procedures to "cable ready" consumer TV equipment. The CAG argues that as the new rules become effective, any non-compliance is likely to be detected by rival consumer electronics manufacturers or by cable operators and brought to the attention of the Commission, which could then correct the violations. SMCTC and NYC urge the Commission to subject these devices to the certification process, where compliance is determined by the Commission before a grant of equipment authorization is made. SMCTC believes that a lesser procedure such as verification is too tempting for some manufacturers to resist taking short-cuts to obtain unfair competitive advantage over complying manufacturers. NYC believes that the verification procedure may be insufficient because the new standards for "cable ready" equipment will entail substantial improvements in the technical performance of TV equipment. NYC believes the close scrutiny of the certification procedure is needed to permit the Commission to monitor compliance.

127. We find that our verification procedure is sufficient to ensure that TV receivers, VCRs and similar consumer electronics equipment comply with our technical requirements, including the new "cable ready" standards. Our decision to subject this equipment to verification is influenced by the long standing record of compliance of television receivers under verification in the Commission's equipment authorization program. Moreover, we believe the requirements adopted herein do not involve any new or advanced technology which would challenge the current capability of the television receiver industry. In response to NYC's concern regarding the lack of compliance monitoring by the Commission under the verification procedure, we intend to closely monitor "cable ready" equipment for

[56] We are specifying the slightly higher 806 MHz upper limit to be consistent with the upper minimum tuning requirement for "cable ready" equipment decided above.

[57] The verification, notification and certification procedures are set forth in Section 2, Subpart J of the rules. *See* 47 C.F.R. §2, Subpart J.

compliance with the standards adopted herein through our sampling program provided for in Section 15.29(d) of the Rules.

128. *Implementation of Rules for New Consumer Equipment.* In the *Notice*, we proposed to require that all consumer electronics equipment manufactured or imported after December 31, 1996, that is marketed as "cable ready" or otherwise marketed as intended for connection directly to cable service comply with the new "cable ready" technical standards. This proposal was based on indications by the CAG and the JEC that they would complete their work on the new channel plan and the updated Decoder Interface standard by the end of 1993.

129. The CAG believes a slightly longer period is needed for implementation of the new equipment rules to ensure a smooth transition. First, it states that the "cable ready" equipment rules should be made effective in the spring season, when new products are generally introduced, rather than in the middle of the busy holiday season. Second, it submits that cable systems should be required to be in a position to provide component descrambler/decoders when Decoder Interface equipped receivers first become available, rather than after the deadline for all "cable ready" sets to incorporate Decoder Interface connectors. The CAG states that current information suggests that cable hardware suppliers may not be in a position to supply decoders in volume before the end of 1996. Based on these considerations, it suggests that the date for compliance with the "cable ready" standards be changed to June 30, 1997. It further recommends that cable operators be required to make decoders available to subscribers no later than December 31, 1996, six months before the deadline for inclusion of Decoder Interface connectors in "cable ready" consumer equipment.[58] The CAG also submits that although products that meet the "cable ready" requirements will not be immediately available, it recommends that the rule prohibit use of the term "cable ready" to describe equipment that does not meet these new standards become effective promptly. NYC similarly submits that until these standards become effective, we should prohibit manufacturers from using the term "cable ready" in connection with their products unless they disclose to consumers that some features of the equipment may not be operable when it is connected to a cable service. Most of the other commenting parties either did not address the implementation date for the new equipment or agreed with our proposed implementation schedule for new equipment.

130. We find that the schedule suggested by the CAG provides an acceptable plan for implementation of the new equipment rules. The relatively short additional time requested by the CAG will accommodate the normal introduction cycle of new consumer TV products and the production of component descrambler/decoders for distribution by cable operators with only a modest delay from our proposed schedule. This schedule will also allow additional time for completion of the Decoder Interface standard so that this feature can be incorporated into all new "cable ready" equipment. Accordingly, we will require that new TV receivers and VCRs marketed using the terms "cable ready" or "cable compatible" after June 30, 1997, comply with the "cable ready" equipment standards. We will consider the CAG's suggestion to require that cable operators provide component descrambler/decoders to subscribers with "cable ready" equipment when we finalize the Decoder Interface standard.

131. We also agree with the CAG and NYC that the rule restricting use of the term "cable ready" to describe new consumer electronics equipment should be implemented promptly in order to minimize confusion for consumers. Accordingly, we are prohibiting use of "cable ready," "cable compatible," and other terms and descriptors that convey the impression a device is *fully* compatible with cable service, in the labeling and packaging of consumer TV receivers and VCRs manufactured or imported for sale to consumers in this country after October 31, 1994, unless that equipment complies with the "cable ready" technical standards.

Standards for Cable Systems

132. *Channelization.* We proposed to require that cable systems built or re-built after one year from the effective date of the new rules use the new EIA IS-132 cable channel plan for channels up to 1 GHz, consistent with our proposals for "cable ready" consumer equipment standards, and to require all cable systems to use this channel plan after 10 years. We also requested comment on how our adoption of the EIA IS-132 channel plan would affect the use of compression methods or multiplexing of cable channels.

133. The commenting parties generally support our proposal to require cable systems to use the EIA IS-132 channel plan. For example, the CAG agrees that this requirement is needed to ensure compatibility with the tuners of consumer electronics equipment. Greater Media and the Joint Cable Commenters submit that cable systems should be allowed to use other channel schemes for transmitting digital and other non-standard signals. The CAG submits that compliance with the EIA IS-132 channel plan is likely to present minimal difficulties for most cable systems and therefore believes that it would be reasonable to implement this standard on a more expedited timetable than that proposed. It recommends that the compliance date for all cable systems be established as June 30, 1997, the same date it proposes for making effective the technical standards for "cable ready" consumer equipment. The CAG further believes that we should provide for accommodating cable operators that are not able to meet this deadline.

134. To complete our adoption of the EIA IS-132 cable channel plan, we are requiring all cable systems to use this plan for transmitting analog television service. We wish to clarify that cable systems will not have to activate channels for all of the channels specified in EIA IS-132, but rather will be required to adhere to the frequency plan in this standard for the analog channels that they provide to their subscribers. While cable systems may use other channel plans for providing digital service, we advise cable operators that, consistent with our plan to adopt cable digital transmission standards as indicated below, we intend to adopt a channel plan for digital cable service at an appropriate time in the future.

135. We are also adopting the proposed transition plan recommended by the CAG for requiring cable systems to implement this new standard. As the portion of EIA IS-132

[58] We are deferring this issue to our subsequent action on the Decoder Interface standard.

that addresses frequencies under 1 GHz has been substantially defined for some time and is already used by most cable systems so that hardware is available, we believe one year is an adequate amount of time for new and re-built cable systems to comply with that standard. We similarly find that it would not be unduly burdensome to require that all cable systems comply with the EIA IS-132 channel plan by June 30, 1997. As the CAG notes, this would ensure that all cable systems are using the channel plan standard when the "cable ready" equipment standards become effective. Accordingly, cable systems built or re-built after May 31, 1995 will be required to comply with the new cable channel standard, and all cable systems must comply with this standard by June 30, 1997.

Future Technologies

136. In the *Notice*, we indicated that in order to avoid future compatibility problems that could arise with the introduction of digital transmission methods by the cable industry, it will be necessary to standardize the system used for digital transmissions. We noted that the CAG has stated that it would be feasible to establish standards for digital compression/decompression and a standard security interface system on a schedule that takes place over the next several years.[59] We recognized that developmental work in this area is still in progress, and therefore requested suggestions for a regulatory plan that would require completion of a digital cable transmission standard in a manner that would allow for timely and efficient introduction of consumer products that could receive service under the new standard.

137. A number of parties agree that we should establish standards for transmission of digital signals on cable systems. The CAG states that a firm understanding that digital standards will be prescribed is important to the current cooperative efforts of the cable and consumer electronics industries and to assure consumers and legislators that the kinds of problems that led to enactment of Section 17 do not occur. The CAG further states that it plans to finish its work on defining digital transmission and tuner specifications by the end of 1994. It indicates that the JEC is investigating on-going digital standards activities both domestically and internationally and will provide a report on this work in mid-1994 that could serve as the basis for a further rule making action by the Commission.[60] Pacific Bell believes the CAG's schedule for developing a cable digital standard is overly ambitious and does not allow time for proper completion of work in a number of complex areas, including technical and market testing. It expresses concern that any standards developed prematurely could face consumer rejection or technical obsolescence. Pacific Bell believes that a more reasonable estimate for completing a digital cable standard is late 1995.

138. Consistent with their position on standards for the Decoder Interface connector and associated component descrambler/decoders, Circuit City, Mitsubishi and News Datacom submit that to provide for a competitive market in hardware and software functions, we should: 1) establish a standard for digital cable transmissions, including security; 2) only allow functions directly related to security to be reserved to hardware/software provided by cable operators; and, 3) require that other functions be accommodated in a manner that would allow them to be provided on a competitive basis. News Datacom, Pacific Bell and SMCTC submit that we should begin to develop standards for cable digital transmission now, to avoid new compatibility problems in the future. Titan similarly requests that we initiate an inquiry into the standardization of digital 525-line television service. News Datacom further recommends that the cable digital standard be compatible with MPEG-2. The Joint Cable Commenters note that the EIA IS-132 channel plan does not define the multiplexing of digitally compressed channels within a 6 MHz channel and submit that the appropriate time to further define the channel plan in this regard would be at the time digital transmission standards are set.

139. GI and the Joint Cable Commenters oppose standardization of cable system security technology or rules that would allow the incorporation of security circuitry into consumer equipment. GI argues that such an approach would give "pirates" a single technical design to attack and thereby undermine the ability of cable operators to protect their signals. Hewlett-Packard and Titan, however, recommend that we also establish a standard security system for cable digital service. They indicate that modern encryption/security methods make it feasible to achieve adequate security in a digital system that separates the signal coding (program information) and access control (security) functions by using standard interfaces and that such an approach would not be less secure than current approaches. Titan states that this approach would allow both the decoder and access control functions to be incorporated into consumer equipment and that access control could be provided through a secure chip within a "smart card." They urge that we proceed expeditiously toward adoption of a standard security system for component descrambler/decoders.

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[59] The CAG indicates that standards for the digital cable environment could be established in accordance with the following timetable:

1993: Define "cable ready"

1994: Define transmission and tuner specifications

No later than 1995: Set target dates for standards for decompression and a standard security interface system.

See "Supplemental Comments of the Cable-Consumer Electronics Compatibility Advisory Group," ET Docket No. 93-7, filed with the Commission July 21, 1993.

[60] The CAG indicates that its work will attempt to balance the need for early identification of proposed standards with the importance of preserving necessary flexibility to permit technological innovation and the development of new services and consumer electronics features. The CAG submits that its work does not intend to foreclose the development of new technology, including new scrambling systems, or the development and delivery of new services such as on-line data services, video games, video telephony, digital music and others. The CAG also states that such services should not be precluded by strict enforcement of the new channelization plan. It indicates that the new Decoder Interface connector is being designed in a fashion which should be able to accommodate new scrambling methodologies and other new services. It further submits that the cable and consumer electronics industries envision establishing procedures whereby new services and scrambling methodologies can be tested for compatibility with the Decoder Interface.

140. Mitsubishi and Titan believe that we should link a standard for cable digital transmissions to the standard for broadcast advanced television (ATV) service. They state that conforming digital standards for broadcast and cable television will avoid the investment of billions of dollars in incompatible systems and provide clear guidance for industry. The Interactive Multimedia Association (IMA) believes that we should also, in the near term and synchronous with the development of digital cable standards, define a return data path from consumer electronics devices to cable service. It states that such a return path is needed to allow the implementation of new interactive multimedia services. The IMA submits that the return path should be compatible with the new Decoder Interface standard and should include a definition of a standard bi-directional protocol for connecting interactive services to consumer equipment.

141. GI, TCI and Home Box Office (HBO) urge that we refrain from proceeding to adopt a digital transmission standard for cable systems now. They state that while digital transmission standards may be useful eventually, the dynamic nature of these emerging technologies could lead to inefficient outcomes if we were to adopt such standards too soon. HBO believes that whatever standard may prove necessary for digital cable transmission will be developed most efficiently through market evolution. TCI states that we should rely on industry groups to develop and recommend cable digital standards. HBO also states that any standards setting action by the Commission now would lead to a halt in the existing transition to digital systems by satellite cable services.

142. AT&T, Bell Atlantic and USTA also argue that we should provide for consideration of all types of video transport services in setting digital transmission, compression and interface standards. AT&T recommends that we initiate a broad ranging inquiry to address interfaces among equipment in the home and to transmission and information processing standards for future digital multimedia products and standards.

143. We recognize the need to proceed with caution in this area and to ensure that our processes and regulations do not unnecessarily impair the development of new cable technologies and services and of appropriate interfaces between such technologies and services with other media. Notwithstanding these considerations, we find that standards for cable digital transmissions are necessary to avoid future compatibility problems when cable systems use digital transmission methods, and to allow the mass production of economical consumer equipment that is compatible with cable digital services. In the latter regard, we believe that standardization is needed to ensure the establishment and effective operation of a competitive market in consumer hardware and software products for connection to digital cable service.

144. As observed by a number of the commenting parties, the development of cable digital standards will have to address a number of important and complex technical and policy issues in addition to the question of compatibility between cable systems and consumer electronics equipment. Some of these include the appropriate compression and signalling technologies, our policy towards encryption methods, the relationship of the cable digital system to the terrestrial broadcast ATV standard and multimedia, whether to require all new and innovative services to adhere to the standards, and the interfaces between cable digital technology and the technologies used to deliver service by alternative media such as video dialtone and direct satellite broadcasting. In view of the broad scope of the issues involved in defining cable digital transmission standards and related policies, we believe it is more appropriate to defer these matters to a separate proceeding. Accordingly, we will not take any further steps toward adoption of cable digital standards in this proceeding. We will address these and other issues relating to digital video technologies and services in a future Notice of Inquiry that will initiate an omnibus proceeding on digital video services.

PROCEDURAL MATTERS

145. Pursuant to Section 603 of the Regulatory Flexibility Act, 5 U.S.C. Section 601, *et seq.*, the Commission incorporated an initial regulatory flexibility analysis (IRFA) in the *Notice of Proposed Rule Making* in this proceeding. Written comments were requested on the IFRA. Our final regulatory analysis is as follows:

I. *Need for and Objective of the Rules:* Section 17 of the Cable Television Consumer Protection and Competition Act of 1992 requires the Commission to prescribe regulations for assuring compatibility between TV receivers and VCRs and cable systems, consistent with the need to prevent theft of cable service. We believe that the rules we are adopting will ensure compatibility between cable systems and consumer equipment while imposing the least burden on equipment manufacturers, cable systems and consumers.

III. *Any Significant Alternatives Minimizing the Impact on Small Entities and Consistent with Stated Objectives.* Wherever possible, we have attempted to minimize costs for both cable operators and consumer electronics manufacturers. The regulatory burdens we are adopting are necessary to ensure that the public receives the benefits of compatibility between cable systems and their TV receivers and VCRs. The major area where alternatives are possible is in the choice of the Decoder Interface connector as a means for avoiding the need to use set-top devices. Use of a Decoder Interface will resolve the need for set-top devices and also provide a path to compatibility with future services that use digital compression. While the Decoder Interface connector will be a new requirement for manufacturers, the cost of this feature is expected to be recoverable through a modest premium in the prices of "cable ready" TV receivers and VCRs. The amount of this increase is likely to be less for cable subscribers than the cost of technologies that would provide subscribers all authorized signals "in the clear." We will continue to examine alternatives in the future, particularly with regard to the technical standard for the Decoder Interface standard, with the objective of minimizing any significant impact of our regulations on small entities.

146. The Commission's Secretary will send a copy of this First Report and Order to the Chief Counsel for Advocacy of the Small Business Administration.

147. Accordingly, IT IS ORDERED that Parts 15 and 76 of the Commission's rules ARE AMENDED as set forth in Appendix A, effective 30 days after the publication of a summary of this First Report and Order in the Federal Register. This action is taken pursuant to authority provided in Sections 4(i), 7(a), 302, 303(c), 303(f), 303(g), 303(r) and 324A of the Communications Act of 1934, as amended 47 U.S.C. Sections 154(i), 157(a), 302, 303(c), 303(f), 303(g), 303(r) and 324A.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

Amendments to the Rules

Parts 15 and 76 of Chapter I of Title 47 of the Code of Federal Regulations are amended as follows:

Part 15 RADIO FREQUENCY DEVICES

1. The authority citation for Part 15 is revised to read as follows:

AUTHORITY: Secs. 4, 302, 303, 304, 307 and 624A of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 302, 303, 304, 307 and 544A.

2. Section 15.3 is amended by adding a new paragraph (aa) to read as follows:

§15.3 Definitions.

(A) * * *

* * * * *

(aa) *Cable ready consumer electronics equipment.* Consumer electronics TV receiving devices, including TV receivers, videocassette recorders and similar devices, that incorporate a tuner capable of receiving television signals and an input terminal intended for receiving cable television service, and are marketed as "cable ready" or "cable compatible." Such equipment shall comply with the technical standards specified in Section 15.118 of this chapter.

3. Section 15.19 is amended by adding a new paragraph (d) to read as follows:

§15.19 Labeling requirements.

(A) * * *

* * * * *

(d) Consumer electronics TV receiving devices, including TV receivers, videocassette recorders and similar devices, that incorporate features intended to be used with cable television service, but do not fully comply with the technical standards for cable ready equipment set forth in Section 15.118 of this chapter, are subject to the following labeling requirements:

(1) Such equipment shall be labeled with an advisory indicating that the device does not fully comply with the Federal Communications Commissions standards for cable ready consumer electronics equipment. The advisory must appear on the device and on its packaging. This requirement applies to consumer TV receivers, videocassette recorders and similar devices manufactured or imported for sale in this country on or after June 30, 1997.

(2) Such equipment shall not be marketed with terminology that describes the device as "cable ready" or "cable compatible," or that otherwise conveys the impression that the device is *fully* compatible with cable service. This requirement applies to consumer TV receivers, videocassette recorders and similar devices manufactured or imported for sale in this country on or after October 31, 1994.

4. Section 15.115 is amended by revising paragraph (c)(1)(*i*) and adding new paragraphs (h) and (i) to read as follows:

§15.115 TV interface devices, including cable system terminal devices.

(A) * * *

* * * * *

(c) * * *

(1) * * *

(i) For a cable system terminal device or a TV interface device equipped for use with a cable system or a master antenna, as defined in paragraph (b)(3) of this section, the isolation between the antenna and cable input terminals shall be at least 80 dB from 54 MHz to 216 MHz, at least 60 dB from 216 MHz to 550 MHz and at least 55 dB from 550 MHz to 806 MHz. The 80 dB standard applies at 216 MHz and the 60 dB standard applies at 550 MHz. In the case of a transfer switch requiring a power source, the required isolation shall be maintained in the event the device is not connected to a power source or power is interrupted. The provisions of this sub-paragraph regarding frequencies in the range 550 MHz to 806 MHz are effective June 30, 1997.

* * * * *

(h) Stand-alone switches used to alternate between cable service and an antenna shall provide isolation between the antenna and cable input terminals that is at least 80 dB from 54 MHz to 216 MHz, at least 60 dB from 216 MHz to 550 MHz and at least 55 dB from 550 MHz to 806 MHz. The 80 dB standard applies at 216 MHz and the 60 dB standard applies at 550 MHz. In the case of stand-alone switches requiring a power source, the required isolation shall be maintained in the event the device is not connected to a power source or power is interrupted. The provisions of this paragraph are effective June 30, 1997.

(i) Switches and other devices intended to be used to by-pass the processing circuitry of a cable system terminal device, whether internal to such a terminal device or a stand-alone unit, shall not attenuate the input signal more than 6 dB from 54 MHz to 550 MHz, or more than 8 dB from 550 MHz to 806 MHz. The provisions of this paragraph are effective June 30, 1997.'ASection 15.117 is amended by revising paragraph (h) to read as follows:

§15.117 TV broadcast receivers.

(A) * * *

* * * * *

(h) For a TV broadcast receiver equipped with a cable input selector switch, the selector switch shall provide, in any of its set positions, isolation between the antenna and cable input terminals of at least 80 dB from 54 MHz to 216 MHz, at least 60 dB from 216 MHz to 550 MHz and at least 55 dB from 550 MHz to 806 MHz. The 80 dB standard applies at 216 MHz and the 60 dB standard applies at 550 MHz. In the case of a selector switch requiring a power source, the required isolation shall be maintained in the event the device is not connected to a power source or power is interrupted. An actual switch that can alternate between reception of cable television service and an antenna is not required for a TV broadcast receiver, provided compliance with the isolation requirement specified in this paragraph can be demonstrated and the circuitry following the antenna input terminal(s) has sufficient bandwidth to allow the reception of all TV broadcast channels authorized under this chapter. The provisions of this paragraph regarding frequencies in the range 550 MHz to 806 MHz are effective June 30, 1997.

6. New Section 15.118 is added to read as follows:

§15.118 Cable ready consumer electronics equipment.

(a) All consumer electronics TV receiving equipment marketed in the United States as cable ready or cable compatible shall comply with the provisions of this section. Consumer electronics TV receiving equipment that includes features intended for use with cable service but does not fully comply with the provisions of this section are subject to the labelling requirements of Section 15.19(d).

(b) Cable ready consumer electronics equipment shall be capable of receiving all NTSC or similar video channels in the frequency range 54 MHz to 804 MHz in accordance with the channel allocation plan set forth in the Electronics Industries Association's "Cable Television Channel Identification Plan, EIA IS-132, May 1994" (EIA IS-132). This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 522(a) and 1 CFR Part 51. Copies of EIA IS-132 may be obtained from: Global Engineering Documents, 2805 McGraw Ave., Irvine CA 92714. Copies of EIA IS-132 may be inspected during normal business hours at the following locations: Federal Communications Commission, 1919 M Street, NW, Dockets Branch (Room 239), Washington, DC, or the Office of the Federal Register, 800 North Capitol Street, NW, Suite 700, Washington, DC.

(c) Cable ready consumer electronics equipment must meet the following technical performance requirements. Compliance with these requirements shall be determined by performing measurements at the unfiltered IF output port. Where appropriate, the Commission will consider allowing alternative measurement methods.

(1) Adjacent channel interference. In the presence of a lower adjacent channel CW signal that is 1.5 MHz below the desired visual carrier in frequency and 10 dB below the desired visual carrier in amplitude, spurious signals within the IF passband shall be attenuated at least 55 dB below the visual carrier of the desired signal. The desired input signal shall be an NTSC visual carrier modulated with a 10 IRE flat field and the aural carrier should be unmodulated. Measurements are to be performed for input signal levels of 0 dBmV and +15 dBmV, with the receiver tuned to ten evenly spaced channels specified in the EIA IS-132 channel plan.

(2) Image channel interference. Image channel interference within the IF passband shall be attenuated below the visual carrier of the desired channel by at least 60 dB from 54 MHz to 806 MHz. In testing for compliance with this standard, the desired input signal is to be an NTSC visual carrier modulated with a 10 IRE flat field and the aural carrier should be unmodulated. The undesired test signal shall be a CW signal equal in amplitude to the desired visual carrier and located 90 MHz above the visual carrier frequency of the desired channel. Measurements shall be performed for input signals of 0 dBmV and +15 dBmV, with the receiver tuned to ten evenly spaced channels specified in the EIA IS-132 channel plan.

(3) Direct pickup interference. The direct pickup (DPU) of a co-channel interfering ambient field by a cable ready device shall not exceed the following criteria. The ratio of the desired to undesired signal levels at the IF passband on each channel shall be at least 45 dB. The average ratio over the six channels shall be at least 50 dB. The desired input signal shall be an NTSC signal having a visual carrier level of 0 dBmV. The equipment under test (EUT) shall be placed on a rotatable table that is one meter in height. Any excess length of the power cord and other connecting leads shall be coiled on the floor under the table. The EUT shall be immersed in a horizontally polarized uniform CW field of 100 mV/m at a frequency 2.55 MHz above the visual carrier of the EUT tuned channel. Measurements shall be made with the EUT tuned to six EIA IS-132 channels, two each in the low VHF, high VHF and UHF broadcast bands. On each channel, the levels at the IF passband due to the desired and interfering signals are to be measured.

(4) Tuner overload. Spurious signals within the IF passband shall be attenuated at least 55 dB from 54 to 806 MHz below the visual carrier of the desired channel using a comb spectrum input with each signal individually set at +15 dBmV. Measurements shall be made with the receiver tuned to ten evenly spaced EIA IS-132 channels.

(5) Cable input conducted emissions. Conducted spurious emissions that appear at the cable input to the device must meet the following criteria. The input shall be an NTSC video carrier modulated with a 10 IRE flat field at a level of 0 dBmV and with a visual to aural ratio of 10 dB. The aural carrier shall be unmodulated. The peak level of the spurious signals will be measured using a spectrum analyzer connected by a directional coupler to the cable input of the equipment under test. Spurious signal levels must not exceed the limits in the following table:

From 54 MHz up to and including 300 MHz-26 dBmV

From 300 MHz up to and including 450 MHz-20 dBmV

From 450 MHz up to and including 806 MHz-15 dBmV

The average of the measurements on multiple channels from 450 MHz up to and including 806 MHz shall be no greater than -20 dBmV. Measurements shall be made with the receiver tuned to at least four EIA IS-132 channels in

each of the above bands. The test channels are to be evenly distributed across each of the bands. Measurements for conducted emissions caused by sources internal to the device are to be made in a shielded room. Measurements for conducted emissions caused by external signal sources shall be made in an ambient RF field whose field strength is 100 mV/m, following the same test conditions as described in paragraph (c)(3) of this section.

(d) The field strength of radiated emissions from cable ready consumer electronics equipment shall not exceed the limits in Section 15.109(a) when measured in accordance with the applicable procedures specified in Section 15.31 and Section 15.35 for unintentional radiators, with the following modifications. During testing the NTSC input signal level is to be +15 dBmV, with a visual to aural ratio of 10 dB. The visual carrier is to be modulated by a 10 IRE flat field; the aural carrier is to be unmodulated. Measurements are to be taken on six EIA IS-132 channels evenly spaced across the required RF input range of the equipment under test.

Note: The provisions of paragraphs (a) through (d) of this section are effective June 30, 1997.

Part 76 CABLE TELEVISION SERVICE

7. The authority citation for Part 76 is revised to read as follows:

AUTHORITY: Secs. 2, 3, 4, 301, 303, 307, 308, 309, 324A 48 Stat., as amended, 1064, 1065, 1066, 1081, 1082, 1083, 1084, 1085, 1101; 47 U.S.C. Secs. 152, 153, 154, 301, 303, 307, 308, 309, 532, 533, 535, 542, 543, 544A, 552 as amended, 106 Stat. 1460.

8. Section 76.605 is amended by redesignating the existing paragraphs (a)(2) through (a)(12) as paragraphs (a)(3) through (a)(13), and adding a new paragraph (a)(2) and to read as follows:

§76.605 Technical standards.

(a) * * *

* * * * *

(2) Cable systems shall transmit channels to subscriber premises equipment on frequencies in accordance with the channel allocation plan set forth in the Electronics Industries Association's "Cable Television Channel Identification Plan, EIA IS-132, May 1994" (EIA IS-132). This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 522(a) and 1 CFR Part 51. Cable systems are required to use this channel allocation plan for signals transmitted in the frequency range 54 MHz to 1002 MHz. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 522(a) and 1 CFR Part 51. Copies of EIA IS-132 may be obtained from: Global Engineering Documents, 2805 McGraw Ave., Irvine CA 92714. Copies of EIA IS-132 may be inspected during normal business hours at the following locations: Federal Communications Commission, 1919 M Street, NW, Dockets Branch (Room 239), Washington, DC, or the Office of the Federal Register, 800 North Capitol Street, NW, Suite 700, Washington, DC. This requirement is effective on May 31, 1995, for new and re-built cable systems, and on June 30, 1997, for all cable systems.

* * * * *

9. New Section 76.630 is added to read as follows:

§76.630 Compatibility with consumer electronics equipment.

(a) Cable system operators shall not scramble or otherwise encrypt signals carried on the basic service tier. Requests for waivers of this prohibition must demonstrate either a substantial problem with theft of basic tier service or a strong need to scramble basic signals for other reasons. As part of this showing, cable operators are required to notify subscribers by mail of waiver requests. The notice to subscribers must be mailed no later than thirty calendar days from the date the request waiver was filed with the Commission, and cable operators must inform the Commission in writing, as soon as possible, of that notification date. The notification to subscribers must state:

> On (date of waiver request was filed with the Commission), (cable operator's name) filed with the Federal Communications Commission a request for waiver of the rule prohibiting scrambling of channels on the basic tier of service. 47 C.F.R. Section 76.630(a). The request for waiver states (a brief summary of the waiver request). A copy of the request for waiver is on file for public inspection at (the address of the cable operator's local place of business).
>
> Individuals who wish to comment on this request for waiver should mail comments to the Federal Communications Commission by no later than 30 days from (the date the notification was mailed to subscribers). Those comments should be addressed to the: Federal Communications Commission, Cable Services Bureau, Washington, D.C. 20554, and should include the name of the cable operator to whom the comments are applicable. Individuals should also send a copy of their comments to (the cable operator at its local place of business).

Cable operators may file comments in reply no later than 7 days from the date subscriber comments must be filed.

(b) Cable system operators that provide their subscribers with cable system terminal devices and other customer premises equipment that incorporates remote control capability shall permit the remote operation of such devices with commercially available remote control units or otherwise take no action that would prevent the devices from being operated by a commercially available remote control unit. Cable system operators are advised that this requirement obliges them to actively enable the remote control functions of customer premises equipment where those functions do not operate without a special activation procedure. Cable system operators may, however, disable the remote control functions of a subscriber's customer premises equipment where requested by the subscriber.

(c) Cable operators may not alter the infrared codes used to operate the remote control capabilities of the customer premises equipment they employ in providing service to

subscribers. Cable operators may, however, use new equipment that includes additional infrared codes for new remote control functions that were not included in existing models of customer premises equipment.

(d) Cable system operators that use scrambling, encryption or similar technologies in conjunction with cable system terminal devices, as defined in Section 15.1(e) of this chapter, that may affect subscribers' reception of signals shall offer to supply each subscriber with special equipment that will enable the simultaneous reception of multiple signals. This equipment could include, for example, set-top cable system terminal devices with multiple descramblers/decoders and/or timers, and signal bypass switches.

(1) The offer of special equipment shall be made to new subscribers at the time they subscribe and to all subscribers at least once each year.

(2) Such special equipment shall, at a minimum, have the capability:

(i) To allow simultaneous reception of any two or more scrambled or encrypted signals and to provide for tuning to alternative channels on a pre-programmed schedule; and,

(ii) To allow direct reception of all other signals that do not need to be processed through descrambling or decryption circuitry (this capability can generally be provided through a separate by-pass switch or through internal by-pass circuitry in a cable system terminal device).

(3) Cable system operators shall determine the specific equipment needed by individual subscribers on a case-by-case basis, in consultation with the subscriber. Cable system operators are required to make a good faith effort to provide subscribers with the amount and types of special equipment needed to resolve their individual compatibility problems.

(4) Cable operators shall provide such equipment at the request of individual subscribers and may charge for purchase or lease of the equipment and its installation in accordance with the provisions of the rate regulation rules for customer premises equipment used to receive the basic service tier, as set forth in Section 76.923. Notwithstanding the required annual offering, cable operators shall respond to subscriber requests for special equipment for reception of multiple signals that are made at any time.

(e) Cable system operators shall provide a consumer education program on compatibility matters to their subscribers in writing, as follows:

(1) The consumer information program shall be provided to subscribers at the time they first subscribe and at least once a year thereafter. Cable operators may choose the time and means by which they comply with the annual consumer information requirement. This requirement may be satisfied by a once-a-year mailing to all subscribers. The information may be included in one of the cable system's regular subscriber billings.

(2) The consumer information program shall include the following information:

(i) Cable system operators shall inform their subscribers that some models of TV receivers and videocassette recorders may not be able to receive all of the channels offered by the cable system when connected directly to the cable system. In conjunction with this information, cable system operators shall briefly explain, the types of channel compatibility problems that could occur if subscribers connected their equipment directly to the cable system and offer suggestions for resolving those problems. Such suggestions could include, for example, the use a cable system terminal device such as a set-top channel converter. Cable system operators shall also indicate that channel compatibility problems associated with reception of programming that is not scrambled or encrypted programming could be resolved through use of simple converter devices without descrambling or decryption capabilities that can be obtained from either the cable system or a third party retail vendor.

(ii) In cases where service is received through a cable system terminal device, cable system operators shall indicate that subscribers may not be able to use special features and functions of their TV receivers and videocassette recorders, including features that allow the subscriber to: view a program on one channel while simultaneously recording a program on another channel record two or more consecutive programs that appear on different channels; and, use advanced picture generation and display features such as "Picture-in-Picture," channel review and other functions that necessitate channel selection by the consumer device.

(iii) In cases where cable system operators offer remote control capability with cable system terminal devices and other customer premises equipment that is provided to subscribers, they shall advise their subscribers that remote control units that are compatible with that equipment may be obtained from other sources, such as retail outlets. Cable system operators shall also provide a representative list of the models of remote control units currently available from retailers that are compatible with the customer premises equipment they employ. Cable system operators are required to make a good faith effort in compiling this list and will not be liable for inadvertent omissions. This list shall be current as of no more than six months before the date the consumer education program is distributed to subscribers. Cable operators are also required to encourage subscribers to contact the cable operator to inquire about whether a particular remote control unit the subscriber might be considering for purchase would be compatible with the subscriber's customer premises equipment. Cable operators also may wish to advise subscribers that subscriber-owned remote control units may not be functional if the cable system changes terminal devices.

Note: The provisions of paragraphs (a) and (b) of this section are effective July 31, 1994, and May 31, 1994, respectively. The provisions of paragraphs (c) through (e) of this section are effective October 31, 1994, except for the requirement under section (d)(1)*(i)* for cable system operators to supply cable system terminal devices with multiple tuners, which is effective October 31, 1995. The initial offer of special equipment to all subscribers, as required under paragraph (d) of this section shall be made by October 31, 1994.

APPENDIX B

Parties Filing Comments and/or Reply Comments

Parties Filing Comments

1. American Telegraph and Telephone Company
2. Barden Cablevision
3. Bell Atlantic

4. BellSouth Telecommunications, Inc.

5. Cable-Consumer Electronics Compatibility Advisory Group (The CAG also submitted an Erratum to Appendices C and D of its comments on February 15, 1994)

6. Cable Telecommunications Association, Inc.

7. Cablevision Industries Corporation

8. Cablevision Systems Corporation

9. Christopher A. Catotti

10. Circuit City Stores, Inc.

11. Continental Cablevision, Inc.

12. Cox Cable Communications and Newhouse Broadcasting Corporation

13. Chris Carrier

14. John Fitzgerald

15. General Instrument Corporation

16. Greater Media, Inc.

17. Hewlett-Packard

18. Home Box Office

19. Interactive Multimedia Association

20. Joint Comments of InterMedia Partners, ML Media Partners and ML Media Opportunity Partners (Joint Cable Commenters)

21. Lakes Region Cable Television Consortium

22. Media General Cable of Fairfax County, Inc.

23. Howard N. Meyer

24. Mitsubishi Electronics America, Inc.

25. Multichannel Communications Sciences, Inc.

26. News Datacom, Inc.

27. New York City Department of Telecommunications and Energy

28. O.D. Page

29. Pacific Telesis Group, Pacific Bell and Nevada Bell (Pacific Bell)

30. Sharp Electronics Corporation

31. Sacramento Metropolitan Cable Television Commission

32. Tele-Communications, Inc.

33. Time Warner Entertainment Company, L.P.

34. The Titan Corporation

35. United States Telephone Association

36. Zenith Electronics Corporation

Parties Filing Reply Comments

1. Ameritech

2. Cable-Consumer Electronics Compatibility Advisory Group (The CAG also submitted an Erratum to Appendices C and D of its comments on February 15, 1994)

3. Cable Telecommunications Association, Inc.

4. Cablevision Systems Corporation

5. Comcast Cable Communications, Inc.

6. The Consumer Electronics Group of the Electronics Industries Association

7. Consumer Electronics Retailers Coalition

8. The Consumer Federation of America and the Home Recording Rights Coalition

9. Continental Cablevision, Inc.

10. DIRECTV, Inc.

11. General Instrument Corporation

12. GTE Service Corporation

13. Home Box Office

14. Joint Comments of InterMedia Partners, ML Media Partners and ML Media Opportunity Partners (Joint Cable Commenters)

15. Media General Cable of Fairfax County, Inc.

16. Multichannel Communications Sciences, Inc.

17. National Cable Television Association, Inc.

18. New York City Department of Telecommunications and Energy

19. Nobody Beats The Wiz, Inc.

20. NYNEX Telephone Companies

21. Pacific Telesis Group, Pacific Bell and Nevada Bell (Pacific Bell)

22. Progressive Retailers Organization, Inc.

23. Oregon Consumer League

24. Satellite Broadcasting and Communications Association of America

25. Scottsdale Television Labs

26. Tele-Communications, Inc.

27. Time Warner Entertainment Company, L.P.

28. The Titan Corporation

29. Viacom International Inc.

30. Zenith Electronics Corporation

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-214

In the Matter of

Amendment of Section 73.202(b),	RM-8287
Table of Allotments,	RM-8350
FM Broadcast Stations.	
(Ocracoke, Edenton, Columbia,	
Pine Knoll Shores, North	
Carolina)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 14, 1994; Released: May 2, 1994

By the Acting Chief, Allocations Branch:

1. At the request of Ocracoke Broadcasters ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 8 FCC Rcd 4943 (1993), proposing the substitution of Channel 224C1 for Channel 225A at Ocracoke, North Carolina, and the modification of petitioner's construction permit for a new Class A FM station to specify operation on Channel 224C1. Comments were filed by the petitioner reiterating its intention to apply for the channel, if allotted. Comments and a counterproposal were filed by Lawrence F. and Margaret A. Loesch ("Loesches").[2] Reply comments were filed by the petitioner and the Loesches.

2. The *Notice* pointed out that the allotment of Channel 224C1 to Ocracoke requires a site restriction of 50 kilometers (31 miles) southwest of the community in order to comply with the Commission's minimum distance separation requirements. At the rule making stage, Class C1 channels are assumed to provide 70 dBu city-grade coverage if the transmitter is located no more than 50 kilometers from the community's furthest point. Therefore, because the proposed site is at the very outer edge, petitioner was requested to provide a showing demonstrating that compliance with Section 73.315 could be achieved from the site specified in the petition. In response, petitioner points out that the transmitter site is located on the mainland and that the area between the transmitter site and Ocracoke is mainly Pamlico Sound. It further states that the station will place a 70 dBu city-grade signal over the entire community.

3. The Loesches, licensees of Station WERX-FM, Edenton, North Carolina, request the substitution of Channel 273C1 for Channel 273C2 at Edenton, the reallotment of Channel 273C1 to Columbia, North Carolina, as its second local aural transmission service, and the modification of Station WERX-FM's license to specify Columbia as its community of license. To accommodate the allotment of Channel 273C1 to Columbia, the Loesches also request the substitution of Channel 224A for unoccupied but applied-for Channel 272A at Pine Knoll Shores, North Carolina. These proposals are mutually exclusive since Pine Knoll Shores is located only 25 kilometers from Ocracoke while the Commission's Rules require a minimum distance separation of 200 kilometers between co-channel Class A and C1 channels. The Loesches contend that their proposal would result in a preferential arrangement of allotments since it could enable Station WERX-FM to serve an additional 34,675 persons within its 60 dBu contour. They state that Station WERX-FM's present service to 91,878 persons would increase to 126,553 persons. Further, they state that the reallotment will not deprive Edenton of its sole local transmission service since FM Station WBXB, Channel 261C2, and daytime-only AM Station WZBO will remain. The Loesches point out that Channel 273C1 can be allotted to Columbia and Channel 224A can be allotted to Pine Knoll Shores in compliance with the Commission's minimum distance separation requirements. In addition, they note that Channel 224A can be used at the site specified by the sole applicant for the Pine Knoll Shores allotment.

4. In reply, petitioner argues that the public interest would not be served by reallotting Station WERX from Edenton to Columbia. It states that Columbia, with a 1990 population of 836 persons, already receives local transmission service from Station WRSF(FM) on Channel 289C1. Edenton, although it would continue to receive local service from one FM and one daytime-only AM station, has a much larger population of 5,268 persons. Petitioner also questions whether the coordinates proposed by the Loesches represent a viable transmitter site. Specifically, petitioner points out that the proposed coordinates are located near Gum Neck, in an isolated, low lying swampy area of Tyrrell County. It believes that it would be very difficult, if not impossible, to construct any tower, much less one of over one thousand feet at that location. In addition, petitioner contends that the allotment coordinates are located in a bombing range used by low flying aircraft from the military bases located on the east coast. Finally, petitioner states that it is not necessary for Station WERX(FM) to be upgraded to a Class C1 in order to serve Columbia. Rather, the station's transmitter is presently located only 9.5 kilometers from Columbia and thus already provides the entire community with a 70 dBu city-grade signal.

5. Petitioner also disputes the Loesches' characterization of the gain in population served by the Ocracoke station as insignificant. Rather, it states that with the proposed location of the transmitter on the mainland, the station will be able to increase the population served from 617 with the Class A facilities to 144,569 persons with the Class C1.

[1] The communities of Edenton, Columbia and Pine Knoll Shores have been added to the caption.
[2] Public Notice of the counterproposal was given September 27, 1993, Report No. 1972.

DISCUSSION

6. After reviewing the pleadings before us, we find that neither of the channels proposed for Ocracoke or Columbia can be allotted in compliance with the Commission's technical requirements. As discussed above, petitioner was asked to demonstrate that Channel 224C1 could comply with Section 73.315 the Commission's Rules regarding city-grade service requirements. Although it states that a 70 dBu signal will be placed over the entire community from its proposed transmitter site, the engineering report accompanying the petitioner's comments states that the distance from the proposed site to the center of the community is 49.13 kilometers (30.53 miles) and to the farthest point of non-Federal land (the city-limits") is 50.56 kilometers (31.43 miles). Therefore, since this exceeds the outer limit of 50 kilometers and no technical study was submitted which definitively showed the predicted 70 dBu contour as encompassing all of the community, we find that the allotment would be technically defective. *See Terrell, Texas and Daingerfield, Texas,* 4 FCC Rcd 750 (1989). As to the proposed allotment at Columbia, we have confirmed that the transmitter site proposed by the Loesches is in a swamp area. In addition, the Loesches did not respond to petitioner's arguments by providing any showing that suitable land within the swamp area is available which would sustain the necessary antenna. It is Commission policy not to allot channels unless compliance with the Commission's technical requirements can be shown at the rule making stage to avoid the allotment of substandard frequencies. *See Wilmington, North Carolina, et al.,* 6 FCC Rcd 6969 (1991).

7. Accordingly, IT IS ORDERED, That the request of Ocracoke Broadcasters (RM-8287) to substitute Channel 224C1 for Channel 225A at Ocracoke, North Carolina, and modify its construction permit accordingly, IS DENIED. IT IS FURTHER ORDERED, That the request of Lawrence F. and Margaret A. Loesch (RM-8350) to substitute Channel 273C1 for Channel 273C2 at Edenton, North Carolina, reallot Channel 273C1 to Columbia, North Carolina, and modify Station WERX's license to specify Columbia as its community of license, IS DENIED.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 92-236

In the Matter of

United	Transmittal Nos.
Telecommunications, Inc.	300, 302 and 303
Revisions to Tariff F.C.C. No. 5	

ORDER TERMINATING INVESTIGATION

Adopted: March 7, 1994; Released: April 28, 1994

By the Commission:

I. INTRODUCTION

1. On December 30, 1991, the Common Carrier Bureau (Bureau) initiated an investigation of the Line Information Database (LIDB) tariffs of several carriers, including United Telecommunications, Inc. (United).[1] A significant part of LIDB service is Common Channel Signalling (CCS) Interconnection Service, which uses a 56 kilobit per second (kbps) channel to connect the access customer's CCS network with the local exchange carrier's (LEC's) signal transfer point (STP).[2] United established two subelements for its CCS interconnection charge. The first subelement is an Access Link Charge, designed to recover the costs of a 56 kilobit per second (kbps) channel connecting the out-of-band signalling customer's premises with United's Signal Transfer Point (STP). The second subelement is the STP port charge, designed to recover the costs of the physical port in United's STP.[3]

2. On August 14, 1992, United filed Transmittal No. 300, to offer out-of-band signalling service, and to extend CCS Interconnection Service from Tennessee to other jurisdictions.[4] As United's CCS Interconnection Service in Tennessee was subject to the LIDB investigation, which was still pending at that time,[5] the Bureau suspended United's tariff for one day. Transmittal 300 took effect on October 14, 1992. The Bureau initiated this investigation to determine whether United's CCS Interconnection rates outside Tennessee are excessive and offered under unjust and unreasonable terms and conditions.[6] To assist in this determination, the Bureau designated four issues for investigation.[7]

3. On November 16, 1992, United filed its direct case. No oppositions or replies were filed. On July 1 and September 28, 1993, United agreed to lower many of the rates subject to this investigation. Based on our examination of United's direct case, and our findings in the LIDB investigation, we conclude that many of United's CCS Interconnection Service rates as originally filed were unjust and unreasonable, but these rates as adjusted are not unreasonable. Therefore, we order United to refund the unjust and unreasonable portion of its CCS Interconnection Service rates, with interest, to its out-of-band signalling customers, as discussed in further detail below.

II. DESIGNATED ISSUES

4. First, the Bureau directed United to explain why use of a cost model called "Common Channel Signalling Cost Information System" (CCSCIS) is appropriate to develop part of its CCS Interconnection charge.[8] United asserts that the CCSCIS model is appropriate for allocating the capital costs of the STP Port charges. According to United, the model is "engineering-oriented," and uses economic theory to produce the individual costs of technology-specific CCS network functions and to assign the costs of shared CCS equipment to individual CCS services. United also characterizes CCSCIS as a "bottom-up cost calculator" and states that it constitutes a method of allocating costs endorsed by equipment manufacturers.[9]

5. Second, the Bureau directed United to justify its CCS Interconnection Service on some basis other than one relying on CCSCIS.[10] For the Access Link Charge, United claims to have used a traditional bottom up cost calcula-

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[1] Local Exchange Carrier Line Information Database, 7 FCC Rcd 525 (Com. Car. Bur. 1991) (*LIDB Investigation Order*), *app. for review denied*, 8 FCC Rcd 2957 (1993). LIDB is a database created by local exchange carriers (LECs). The LECs' databases are interconnected in order to enable LECs to share with each other and with interested third parties data on the account status of LEC joint use calling cards, as well as information on line numbers, such as third party billing exceptions. *See LIDB Investigation Order*, 7 FCC Rcd at 525 (para. 3).

[2] *LIDB Investigation Order*, 7 FCC Rcd at 525 (para. 4).

[3] United Telecommunications, Inc., Revisions to Tariff F.C.C. No. 5, CC Docket 92-236, 7 FCC Rcd 6764, 6764 (para. 2) (Com. Car. Bur. 1992) (*United Investigation Order*). STPs are packet switches that provide CCS message routing. For a diagram showing United's CCS Interconnection service, and the relation of this service to LIDB service, see Local Exchange Carrier Line Information Database, CC Docket No. 92-24, 8 FCC Rcd 7130 (1993) (*LIDB Final Order*), at App. B. In that Order, we referred to the Access Link rate element as the "signalling link," which provides the transport between the LEC STP and the interexchange carrier (IXC) STP.

[4] Out-of-band signalling can be used by the LEC to transmit information to IXCs for Lprocessing a call and providing IXCs with faster call set-up than is possible with in-band signalling. *See LIDB Investigation Order*, 7 FCC Rcd at 525 (para. 4).

[5] The LIDB investigation has since been terminated. *See LIDB Final Order*, 8 FCC Rcd at 7139 (para. 62).

[6] *United Investigation Order*, 7 FCC Rcd at 6765 (para. 7).

[7] *United Investigation Order*, 7 FCC Rcd at 6765 (para. 8).

[8] *United Investigation Order*, 7 FCC Rcd at 6765, para. 8, Issue (1). CCSCIS is a proprietary cost model developed by Bell Communications Research (Bellcore) to generate unit investments for common channel signalling services. CCSCIS operates similarly to the Switching Cost Information System (SCIS), also developed by Bellcore. For a detailed discussion of SCIS, see Commission Requirements for Cost Support Material To Be Filed with Open Network Architecture Access Tariffs, 7 FCC Rcd 1526 (Com. Car. Bur. 1992) (*SCIS Disclosure Order*), *app. for review pending*.

[9] United Direct Case at 3.

[10] *United Investigation Order*, 7 FCC Rcd at 6765 (para. 8, Issue (2)).

tion methodology. United maintains that it based its calculations on projected future costs associated with similar special access services.[11]

6. Next, the Bureau required United to provide total investment underlying each rate element of its CCS Interconnection Service and identify the accounts established by Part 32 of the Commission's Rules in which these investments are recorded.[12] United lists in Attachment A to its direct case the Part 32 accounts where it states it recorded CCS Interconnection Service.[13] In its Attachment B, United reproduces Exhibits 3-1 to 3-8 of its Description and Justification (D&J) for Transmittal 300, which it says show total investment underlying each rate element of its CCS Interconnection service.[14]

7. Finally, the Bureau required United to identify and fully document all overhead and direct cost factors applied to the investment identified above to develop the rates, cross-referencing to Automated Reporting Management Information System (ARMIS) data where possible.[15] United argues that the Commission's price cap rules require United to set prices between average variable cost and fully distributed costs.[16] United states that it based its direct cost factor on Special Access expense and investment information in its 1991 ARMIS 43-04 report, and from state and federal tax rate information. United also maintains that its fully distributed cost factor is based on Special Access expense and investment information in its 1991 ARMIS 43-04 report.[17]

III. DISCUSSION

8. The Bureau initiated this investigation and designated these issues to determine whether the rates for United's CCS Interconnection Service outside Tennessee are excessive or offered under unjust and unreasonable terms and conditions.[18] We investigated United's Tennessee CCS Interconnection rates in the context of the LIDB tariff investigation.[19] Several carriers, including United, used CCSCIS to develop some or all of their LIDB rates, including CCS Interconnection rates.[20] The Commission found that, in general, it cannot accurately assess the reasonableness of rates if those rates are based on a proprietary computer model that has not been filed with the Commission.[21] However, the Commission also concluded that it was not necessary to rely on CCSCIS to evaluate the reasonableness of CCS Interconnection rates. For both those LECs that relied on proprietary data and those that did not, we found that the reasonableness of the amount of direct investment used to provide LIDB service can be evaluated by comparing the proportion of investment assigned with LIDB's relative share of the demand for all services that use the equipment.[22] Thus, we were able to examine the reasonableness of the amount of investment assigned to LIDB based on this relative usage rather than relying on CCSCIS.[23] Because United also used CCSCIS to develop some of the rates at issue in this investigation, we conclude that our analysis of United's rates in the LIDB tariff investigation is also suitable to use to evaluate these rates.[24]

9. As in the LIDB rate investigation, our analysis of the reasonableness of United's CCS interconnection rates was a three step process.[25] First, we examined United's direct investment to determine whether the investment assigned to these rate elements was reasonable. Second, we examined the amount of direct cost[26] United assigned to each rate element to determine whether the direct costs fell within a reasonable range, as compared to the level of direct investment. Third, we evaluated whether the claimed overhead expenses were reasonable, as compared to the level direct costs.

10. United recalculated the rates in its direct case for CCS Interconnection Service assuming longer plant lives for LIDB and SS7-related plant than it assumed in its direct case, and provided the cost support for these recalculated rates in an *ex parte* statement filed on May 14, 1993.[27] Applying the analysis we used to evaluate United's rates in the LIDB tariff investigation, we find the following: (1) the amount of investment United allocated to CCS interconnection service is consistent with United's relative use of that investment to provide CCS interconnection service; (2) in its response to the data request, United justified the amount of direct costs claimed in its tariff filing; but (3) United has not justified its overhead loadings. Therefore, we find that these rates are unreasonable pursuant to Section 201(b) of the Communications Act, 47 U.S.C. § 201(b).

11. Since United's direct case was filed, United submitted its July 1, 1993, price cap filing, in which it lowered some of the rates under investigation here.[28] We find these revised rates to be reasonable. Furthermore, on September 28, 1993, United proposed to lower the remaining CCS interconnection rates based on lower overhead loadings than those used in its original filing.[29] We find that Unit-

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[11] United Direct Case at 3-4.

[12] *United Investigation Order*, 7 FCC Rcd at 6765 (para. 8, Issue (3)), *citing* Part 32 of the Commission's Rules, 47 C.F.R. Part 32.

[13] These accounts are 2111, Land; 2121, Buildings; 2212, Digital Electronic Switching; 2232, Circuit Equipment; 2411, Poles; 2421, Aerial Cable; 2422, Underground Cable; 2423, Buried Cable; and 2441, Conduit Systems. United Direct Case, Att. A.

[14] *Id.* at Att. B.

[15] *United Investigation Order*, 7 FCC Rcd at 6765 (para. 8, Issue (4)).

[16] United Direct Case at 4-5.

[17] *Id.* at 5.

[18] *United Investigation Order*, 7 FCC Rcd at 6765 (para. 7).

[19] *LIDB Investigation Order*, 7 FCC Rcd at 528 (para. 23); *United Investigation Order*, 7 FCC Rcd at 6764 (para. 1).

[20] *LIDB Final Order*, 8 FCC Rcd at 7131 (para. 7).

[21] *Id.* at 7131 (para. 11).

[22] *Id.*

[23] *Id.*

[24] *See LIDB Final Order*, 8 FCC Rcd at 7131-32 (paras. 10-13), and App. C for a description of our methodology.

[25] *LIDB Final Order*, 8 FCC Rcd at 7131 (para. 10).

[26] Direct investment is the one-time cost of the equipment used to provide the service. Direct costs are the ongoing costs of providing the service. At a minimum, these include depreciation, return on investment, and taxes.

[27] *See* Letter from Richard D. Lawson, United Telephone Companies, to Secretary, Federal Communications Commission, Exh. C at 3 (May 14, 1993) (May 14 Letter).

[28] In particular, United lowered the multiplexer charge applicable in its Florida study area, the DS1 channel mileage per mile charge in its North Carolina study area, and the 56 kbps service termination charge and the DS1 channel mileage per mile charge in its Eastern Group study area.

[29] Letter from Richard D. Lawson, United Telephone Companies, to Chief, Tariff Division, at Att. A (September 28, 1993) (September 28 Letter).

ed's new rates are just and reasonable. Accordingly, United is permitted to revise its rates as proposed in the September 28 Letter. Finally, we also require United to refund the amounts collected in excess of the rates in its September 28 Letter and its CCS interconnection rates as revised in its 1993 price cap filing described above, plus simple interest, during the period beginning October 14, 1992.[30]

12. In the *LIDB Final Order*, we required United and other LECs with excessive LIDB rates to recalculate their July 1, 1993, Actual Price Indexes (API) and Service Band Indexes (SBI) for purposes of the Commission's price cap rules.[31] However, in its September 28 Letter, United showed that revision of the rates subject to this investigation would have a *de minimis* effect on these price cap indexes. Accordingly, no API or SBI adjustments need be made as a result of lowering rates to the levels proposed in the September 28 Letter.

IV. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 204(a), 205, and 403 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 204(a), 205, and 403, that the common channel signalling interconnection rates of United Telecommunications, Inc., filed in Transmittal No. 300, ARE UNLAWFUL to the extent indicated above.

14. IT IS FURTHER ORDERED that the Common Channel Signalling interconnection rates as described in the United Telecommunications, Inc. *ex parte* statement of September 28, 1993, are just, reasonable, and MAY BE FILED by United Telecommunications, Inc.

15. IT IS FURTHER ORDERED that United Telecommunications, Inc. SHALL MAKE REFUNDS, in the amounts specified in paragraph 11 of this Order, *supra*, to its out-of-band signalling customers. Interest shall be computed on the basis of simple interest rates specified by the United States Internal Revenue Service.

16. IT IS FURTHER ORDERED, pursuant to Sections 4(i), 4(j), 204(a), 205, and 403 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 204(a), 205, and 403, that United Telecommunications, Inc. IS AUTHORIZED to file tariff revisions reflecting our findings in this investigation no later than 10 days from the release date of this Order.

17. IT IS FURTHER ORDERED that, for purposes of compliance with this Order, we waive Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59. United Telecommunications, Inc., should cite the "FCC" number of the instant Order as the authority for this filing.

18. IT IS FURTHER ORDERED that the investigation and accounting order imposed by the Common Carrier Bureau in CC Docket No. 92-236 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[30] In the *LIDB Final Order*, we concluded that simple interest was appropriate in that case because the carriers voluntarily reduced their rates, and because that was the first time rates were investigated under the new services test. *LIDB Final Order*, 8 FCC Rcd at 7132 n.27. For these reasons, we find that simple interest is also appropriate in this case. In the *LIDB Final Order*, we also directed United and other LECs to submit plans for issuing refunds and delegated authority to the Chief, Common Carrier Bureau, to review and approve these plans. *LIDB Final Order*, 8 FCC Rcd at 7132 n.28. We hereby direct United to issue the refunds required by this Order using the plan filed and approved pursuant to the *LIDB Final Order*, or to submit an alternative plan within 30 days of the release date of this Order. We delegate authority to the Chief, Common Carrier Bureau, to review and approve United's plan should it choose to file an alternative plan.

[31] *LIDB Final Order*, 8 FCC Rcd at 7132 (para. 13).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Advance Technology Systems, Inc.
San Diego, California

NAL/Acct. No. 215SD0001

ORDER

Adopted: April 21, 1994; **Released: May 3, 1994**

By the Chief, Field Operations Bureau:

I. INTRODUCTION

1. Advance Technology Systems, Inc (ATS) filed a Petition for Reconsideration, requesting reconsideration of the monetary forfeiture of $7,000 issued for violation of Section 302(b) of the Communications Act of 1934, as amended, (the Act), and Section 2.803 of the Commission's Rules. 47 U.S.C. Section 302(b) and 47 C.F.R. Section 2.803. For the reasons noted below, the Bureau affirms the monetary forfeiture.

II. BACKGROUND

2. On August 15, 1992, the Federal Communications Commission's (FCC) San Diego Office issued a Notice of Apparent Liability (NAL) to ATS. The penalty was imposed for marketing five ATS personal computers that had not been authorized by the FCC. Based on the response from ATS, the FCC's San Diego Office issued a Notice of Forfeiture (NOF) for $7,000 on February 12, 1993. ATS now appeals. The petitioner contends that it was merely displaying the computers and did not offer them for sale. Furthermore, ATS claims inability to pay the penalty.

III. DISCUSSION AND CONCLUSION

3. The arguments raised by ATS in its Petition for Reconsideration have been thoroughly considered and are incorporated herein by reference. Upon review of these arguments raised in the petition as well as review of the NAL and NOF, we find that the petitioner fails to present any new arguments or evidence that was not previously addressed.

4. Section 2.803 of the FCC's rules prohibits not only the selling of computers that lack FCC authorization, but also the displaying and advertising of these computers. We note that the petitioner claims that it cannot pay the forfeiture and submitted financial information in support of this contention. The financial information does not support this contention, so we affirm the forfeiture amount accordingly.

IV. ORDERING CLAUSES

5. IT IS ORDERED THAT, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Section 1.106 of the Rules, 47 C.F.R. § 1.106, the petition for reconsideration is DENIED.

6. IT IS FURTHER ORDERED that ATS must pay the forfeiture amount of Seven Thousand Dollars ($7,000) within thirty (30) days of receipt of this Order. Payment may be made by check or money order payable to the Federal Communications Commission.[1] Please place NAL/Acct. No. 215 SD 0001 on the remittance and mail it to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

7. IT IS FURTHER ORDERED that a copy of this Order shall be sent to Advance Technology Systems, Inc.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

[1] Requests for installment plans should be mailed to: Chief, Billings and Collections, Mail Stop 1110A2, 1919 M Street, N.W., Washington, D.C. 20554. Payment of the forfeiture in installments may be considered as a separate matter in accordance with Section 1.1914 of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TECH-REPAIR NAL/Acct. No. 315HL0011
Kaneohe, Hawaii

ORDER

Adopted: April 21, 1994; Released: May 3, 1994

By the Chief, Field Operations Bureau:

I. INTRODUCTION

1. TECH-REPAIR filed a Petition for Reconsideration, requesting reconsideration of the monetary forfeiture of $7,000 issued for violation of Section 302(b) of the Communications Act of 1934, as amended, (the Act), and Section 2.803 of the Commission's Rules. For the reasons noted below, the Bureau affirms the monetary forfeiture.

II. BACKGROUND

2. On April 13, 1993, the Honolulu Office issued a Notice of Apparent Liability (NAL) to TECH-REPAIR. The penalty was imposed for offering for sale a model 4650 computer which is not certified by the Commission. The salesman stated that the computer was a "bare-bones" unit; that is, TECH-REPAIR takes a case, a power supply, and a Central Processing Unit (CPU) and then assembles them according to what the customer desires. The salesman also queried the undercover Commission agent as to how to get certification for the case and power supply. Based on the response from TECH-REPAIR, the Honolulu Office issued a Notice of Forfeiture (NOF) for $7,000 on June 3, 1993. TECH-REPAIR now appeals. The petitioner contends that even though the manufacturer's name was not displayed on the computer, the computer is the "exact same system supplied to them by Koutech Systems, Inc., for whom they are a reseller".

III. DISCUSSION AND CONCLUSION

3. The arguments raised in the Petition for Reconsideration have been thoroughly considered and are incorporated herein by reference. Upon review of these arguments raised in the petition as well as review of the NAL and NOF, we find that it is apparent from petitioner's own statements that the 4650 personal computer offered for sale by TECH-REPAIR is not the same computer offered for sale by Rowtech Systems, Inc., under the FCC ID 1JWKS420. Thus, the petitioner fails to present any new arguments or evidence that was not previously addressed.

IV. ORDERING CLAUSES

4. IT IS ORDERED THAT, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Section 1.106 of the Rules, 47 C.F.R. § 1.106, the petition for reconsideration is DENIED.

5. IT IS FURTHER ORDERED that TECH-REPAIR must pay the forfeiture amount of Seven Thousand Dollars ($7,000) within thirty (30) days of receipt of this Order. Payment may be made by check or money order payable to the Federal Communications Commission.[1] Please place NAL/Acct. No. 315HL0011 on the remittance and mail it to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

6. IT IS FURTHER ORDERED that a copy of this Order shall be sent to TECH-REPAIR.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

[1] Requests for installment plans should be mailed to: Chief, Billings and Collections, Mail Stop 1110A2, 1919 M Street, N.W., Washington, D.C. 20554. Payment of the forfeiture in installments may be considered as a separate matter in accordance with Section 1.1914 of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Wess Albert Brown dba Brown's Towing
Chico, California

NAL/Acct. No.215SF0070

ORDER

Adopted: April 21, 1994; **Released: May 3, 1994**

By the Chief, Field Operations Bureau:

I. INTRODUCTION

1. Wess Albert Brown dba Brown's Towing filed a Petition for Reconsideration, requesting reconsideration of the monetary forfeiture of $2,400 issued for violation of Section 301 of the Communications Act of 1934, as amended (the Act). For the reasons noted below, the Bureau cancels the monetary forfeiture amount.

II. BACKGROUND

2. On August 28, 1992 , the San Francisco Office issued a Notice of Apparent Liability (NAL) to Wess Albert Brown dba Brown's Towing. The penalty was imposed for transmitting on a frequency assigned to the State of California. Based on the response from Wess Albert Brown, the San Francisco Office issued a Notice of Forfeiture (NOF) for $2,400 on October 15, 1992. Wess Albert Brown dba Brown's Towing now appeals. The petitioner contends that he was not responsible for the operation and does not have the ability to pay the forfeiture.

III. DISCUSSION AND CONCLUSION

3. The arguments raised at the seventh and tenth paragraphs of the Petition for Reconsideration have been thoroughly considered and are incorporated herein by reference. Review of these arguments raised in the petition, as well as review of the NAL and NOF, reveal the fact that while the service company may have misled the petitioner, it does not relieve the operator of his responsibility to comply with the Communications Act. Therefore, the forfeiture amount will not be reduced for this reason.

4. However, the petitioner claims that it would be a hardship to pay the forfeiture and submitted financial information in support of this contention. In light of this showing, we are cancelling the forfeiture.

IV. ORDERING CLAUSES

5. IT IS ORDERED THAT, pursuant to Section 503(b) of the Act, U.S.C. § 503(b), and Section 1.106 of the Rules, 47 C.F.R. § 1.106, the petition for reconsideration is GRANTED in part and DENIED in all other respects.

6. IT IS FURTHER ORDERED that a copy of this Order shall be sent to Wess Albert Brown dba Brown's Towing.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Youngs Wrecker Service
Slidell, Louisiana

NAL/Acct. No. 215OR0003

ORDER

Adopted: April 21, 1994; Released: May 3, 1994

By the Chief, Field Operations Bureau:

I. INTRODUCTION

1. Youngs Wrecker Service filed a Petition for Reconsideration, requesting reconsideration of the monetary forfeiture of $8,000 issued for violation of Section 301 of the Communications Act of 1934, as amended (the Act). For the reasons noted below, the Bureau reduces the monetary forfeiture amount to $6,400.

II. BACKGROUND

2. On July 30, 1992, the New Orleans Office issued a Notice of Apparent Liability (NAL) to Youngs Wrecker Service. The penalty was imposed for unlicensed radio station operation on the frequency of 463.250 MHz. Based on no response from Youngs Wrecker Service, the New Orleans Office issued a Notice of Forfeiture (NOF) for $8,000 on September 16, 1992. Youngs Wrecker Service now appeals. The petitioner contends Youngs Wrecker Service did not "become aware of the issuance of the Notice of Liability" until after receiving the Forfeiture Order on September 26, 1992. He further contends that Youngs Wrecker Service did not "willfully" violate Section 301 of the Communications Act.

III. DISCUSSION AND CONCLUSION

3. The arguments raised in the Petition for Reconsideration have been thoroughly considered and are incorporated herein by reference. In regards to Youngs Wrecker Service claiming non-receipt of the initial Notice of Apparent Liability: a signed Postal Service receipt (PS Form 3811) was returned as proof of delivery.

4. Youngs Wrecker Service also contends that the violation was not "willful". However, at the time of inspection, the radio operator on duty freely admitted to the radio operation. Section 312(f) of the Communications Act of 1934, as amended, states that "the term willful, when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act." Review of these arguments raised in the petition as well as review of the NAL and NOF, reveals that Youngs Wrecker Service's past history of no violations was not properly considered. Thus, the forfeiture amount will be reduced accordingly.

IV. ORDERING CLAUSES

5. IT IS ORDERED THAT, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Section 1.106 of the Rules, 47 C.F.R. § 1.106, the petition for reconsideration is GRANTED in part and DENIED in all other respects.

6. IT IS FURTHER ORDERED that Youngs Wrecker Service must pay the forfeiture amount of Six Thousand Four Hundred dollars ($6,400) within thirty (30) days of receipt of this Order. Payment may be made by check or money order payable to the Federal Communications Commission.[1] Please place NAL/Acct. No. 215OR0003 on the remittance and mail it to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

7. IT IS FURTHER ORDERED that a copy of this Order shall be sent to Craig Young dba Youngs Wrecker Service.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

[1] Requests for installment plans should be mailed to: Chief, Billings and Collections, Mail Stop 1110A2, 1919 M Street, N.W., Washington, D.C. 20554. Payment of the forfeiture in installments may be considered as a separate matter in accordance with Section 1.1914 of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Warp Speed Light Pens, Inc.
Ruidoso, New Mexico

NAL/Acct. No. 315DV0005

ORDER

Adopted: April 21, 1994; Released: May 3, 1994

By the Chief, Field Operations Bureau:

I. INTRODUCTION

1. Warp Speed Light Pens, Inc., (Warp Speed) filed a Petition for Reconsideration, requesting reconsideration of the monetary forfeiture of $7,000 issued for violation of Section 302(b) of the Communications Act of 1934, as amended, (the Act), and Section 2.803 of the Commission's Rules. For the reasons noted below, the Bureau reduces the monetary forfeiture.

II. BACKGROUND

2. On December 8, 1992, the Denver Office issued a Notice of Apparent Liability (NAL) to Warp Speed. The penalty was imposed for marketing uncertified personal computer peripherals. Based on the response from Warp Speed, the Denver Office issued a Notice of Forfeiture (NOF) for $7,000 on January 5, 1993. Warp Speed now appeals. The petitioner contends that the adapter board in question is not required to be certified.

III. DISCUSSION AND CONCLUSION

3. The arguments raised in the Petition for Reconsideration have been thoroughly considered and are incorporated herein by reference. Upon review of these arguments raised in the petition as well as review of the NAL and NOF, we find that the petitioner fails to present any new arguments or evidence that was not previously addressed. However, we note that the Petitioner has not violated our Rules previously and the forfeiture amount will be reduced accordingly.

IV. ORDERING CLAUSES

4. IT IS ORDERED THAT, pursuant to Section 503(b) of the Act, 47 U.S.C. §503(b), and Section 1.106 of the Rules, 47 C.F.R. §1.106, the petition for reconsideration is DENIED.

5. IT IS FURTHER ORDERED that Warp Speed Light Pens, Inc., must pay the forfeiture amount of FIVE THOUSAND SIX HUNDRED DOLLARS ($5,600) within thirty (30) days of receipt of this Order. Payment may be made by check or money order payable to the Federal Communications Commission.[1] Please place NAL/Acct. No. 315DV0005 on the remittance and mail it to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

Forfeiture penalties not paid within 30 days may be referred to the U.S. Attorney for recovery in a civil suit. 47 U.S.C. § 504(a).

6. IT IS FURTHER ORDERED that a copy of this Order shall be sent to Warp Speed Light Pens, Inc.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

[1] Requests for installment plans should be mailed to: Chief, Billings and Collections, Mail Stop 1110A2, 1919 M Street, N.W., Washington, D.C. 20554. Payment of the forfeiture in installments may be considered as a separate matter in accordance with Section 1.1914 of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 80-286

In the Matter of

Amendment of Part 36 of the
Commission's Rules and
Establishment of a Joint Board

ORDER

Adopted: March 28, 1994; Released: April 1, 1994

By the Commission:

1. On December 8, 1993, the National Association of Regulatory Utility Commissioners, pursuant to section 410(c) of the Communications Act,[1] nominated Cheryl L. Parrino, Chairman, Public Service Commission of Wisconsin, to serve on the Joint Board in CC Docket No. 80-286.[2] Commissioner Parrino would fill the vacancy on the Joint Board resulting from the departure of Thomas M. Beard, formerly Chairman of the Florida Public Service Commission.

2. Pursuant to Section 410(c) of the Communications Act, we hereby appoint Commissioner Parrino to serve on the Joint Board established in CC Docket No. 80-286. Henceforth a copy of all filings in this proceeding shall be served on Commissioner Parrino at the following address:

The Honorable Cheryl L. Parrino
Chairman
Public Service Commission of Wisconsin
4802 Sheboygan Avenue
Post Office Box 7854
Madison, Wisconsin 53707-7854.
Telephone: (608)267-7899.

3. ACCORDINGLY, IT IS ORDERED that the Honorable Cheryl L. Parrino serve as a state member of the Joint Board in CC Docket No. 80-286.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[1] 47 U.S.C. § 410(c) (1985).
[2] Letter from Paul Rodgers, General Counsel, National Association of Regulatory Utility Commissioners, dated December 8, 1993.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Alpha Systems Lab — NAL/Acct. No. 315LA0011
Irvine, California

ORDER

Adopted: April 21, 1994; Released: May 4, 1994

By the Chief, Field Operations Bureau:

I. INTRODUCTION

1. Alpha Systems Lab filed a Petition for Reconsideration, requesting reconsideration of the monetary forfeiture of $7,000 issued for violation of Section 302(b) of the Communications Act of 1934, as amended, 47 U.S.C. §302(b), and Section 2.803 of the Commission's Rules, 47 C.F.R. § 2.803. For the reasons noted below, the Bureau reduces the monetary forfeiture.

II. BACKGROUND

2. On December 7, 1992, the Los Angeles Field Office issued a Notice of Apparent Liability (NAL) to Alpha Systems Lab. The penalty was imposed for exhibiting uncertified personal computing devices at the Fall Comdex Computer Trade Show. Based on the response from Alpha, the Los Angeles Field Office issued a Notice of Forfeiture (NOF) for $7,000 on December 22, 1992. Alpha Systems Lab now appeals. The petitioner contends that since it was a first offense, they should have been given a warning notice and not an unreasonable monetary fine.

III. DISCUSSION AND CONCLUSION

3. The arguments raised in the Petition for Reconsideration have been thoroughly considered and are incorporated herein by reference. Upon review of these arguments raised in the petition as well as review of the NAL and NOF, we find that the petitioner fails to present any new evidence that was not previously addressed. However, we note that the petitioner has no record of any previous violations of the Commission's Rules. Thus, the forfeiture amount will be reduced accordingly.

IV. ORDERING CLAUSES

4. IT IS ORDERED THAT, pursuant to Section 503(b) of the Act, 47 U.S.C. §503(b), and Section 1.106 of the Rules, 47 C.F.R. §1.106, the petition for reconsideration is DENIED.

5. IT IS FURTHER ORDERED that Alpha Systems Labs must pay the forfeiture amount of Five Thousand Six Hundred Dollars ($5,600) within thirty (30) days of receipt of this Order. Payment may be made by check or money order payable to the Federal Communications Commission.[1] Please place NAL/Acct. No. 315LA0011 on the remittance and mail it to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

6. IT IS FURTHER ORDERED that a copy of this Order shall be sent to Alpha Systems Lab.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

[1] Requests for installment plans should be mailed to: Chief, Billings and Collections, Mail Stop 1110A2, 1919 M Street, N.W., Washington, D.C. 20554. Payment of the forfeiture in installments may be considered as a separate matter in accordance with Section 1.1914 of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Dennis Clendenion NAL/Acct. No. 315PS0002
Lakin, West Virginia

ORDER

Adopted: April 21, 1994; Released: May 4, 1994

By the Chief, Field Operations Bureau:

I. INTRODUCTION

1. Dennis Clendenion (Clendenion) filed a Petition for Reconsideration, requesting reconsideration of the monetary forfeiture of $2,000 issued for violation of Section 301 of the Communications Act of 1934, as amended, 47 U.S.C. §301 (the Act). For the reasons noted below, we are cancelling the monetary forfeiture.

II. BACKGROUND

2. On October 23, 1992, the Powder Springs Office of the Field Operations Bureau issued a Notice of Apparent Liability (NAL) to Dennis Clendenion. The penalty was imposed for operating on 5555.0 kHz without an instrument of authorization. Based on the response from Mr. Clendenion, the Powder Springs Office issued a Notice of Forfeiture (NOF) for $2,000 on November 23, 1992. Mr. Clendenion now appeals. The petitioner contends that he is unable to pay the fine, and submits tax and other relevant information in support of his claim.

III. DISCUSSION AND CONCLUSION

3. The arguments raised in the Petition for Reconsideration have been thoroughly considered and are incorporated herein by reference. Upon review of these arguments as well as review of the NAL and NOF, we find that the imposed forfeiture is not in accord with the Act and rules, and is hereby cancelled. In particular, we are persuaded that the tax information submitted by petitioner demonstrates that he is unable to pay the $2,000 fine. In addition, we note that Mr. Clendenion has no prior history of violations.

IV. ORDERING CLAUSES

4. IT IS ORDERED THAT, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Section 1.106 of the Rules, 47 C.F.R. § 1.106, the petition for reconsideration is GRANTED and the monetary forfeiture is CANCELLED.

5. IT IS FURTHER ORDERED that a copy of this Order shall be sent by certified mail, return receipt requested to Dennis Clendenion.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Foster's Stereo Center
Ontario, California

NAL/Acct. No. 315LA0135

ORDER

Adopted: April 21, 1994; Released: May 4, 1994

By the Chief, Field Operations Bureau:

I. INTRODUCTION

1. Foster's Stereo Center (Petitioner) filed a Petition for Reconsideration, requesting reconsideration of the monetary forfeiture of $7,000 issued for violation of Section 302(b) of the Communications Act of 1934, as amended (the Act), 47 U.S.C. §302(b) and Section 2.815(b) of the Commission's Rules, 47 C.F.R. §2.815(b). For the reasons noted below, the Bureau reduces the monetary forfeiture amount to $5,600.

II. BACKGROUND

2. On September 17, 1993, the Commission's Los Angeles Office issued a Notice of Apparent Liability (NAL) to Foster's Stereo Center. The penalty was imposed for offering to sell a 100 watt Citizens Band (CB) Radio Frequency (RF) power amplifier for $100 to an undercover FCC investigator. Based on the Petitioner's response, the Los Angeles Office issued a Notice of Forfeiture (NOF) for $7,000 on October 21, 1993. Petitioner now appeals. The petitioner denies ever making the offer for sale, and contends that it does not stock CB power amplifiers, but merely told the investigator that he could order one for him. Petitioner further argues that it has been in business for 26 years and has never been cited for violating any FCC rules.

III. DISCUSSION AND CONCLUSION

3. The arguments raised in Petitioner's request for reconsideration have been thoroughly considered and are incorporated herein by reference. Review of the arguments raised in the Petition as well as review of the NAL and NOF, reveals that Petitioner's assertions are not credible. Indeed, Petitioner's statements and actions indicate that the owner of the shop (also the salesperson) knew it was illegal to market the device. He admits that he asked the investigator whether he was associated with the FCC or any government agency after the investigator asked whether or not he sold CB amplifiers. Upon being reassured that the prospective purchaser was not a U.S. government agent, he proceeded to quote him a price of $100 for a 100 watt device and $250 for a 300 watt device. Although Petitioner did tell the inspector that he did not stock the device, he offered to order it for him with the delivery by the next day.

4. A review of Commission records does indicate, however, that Petitioner has no prior violation of Commission rules on record. Accordingly, we are reducing the amount of the forfeiture to $5,600.

IV. ORDERING CLAUSES

5. IT IS ORDERED, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Section 1.106 of the Rules, 47 C.F.R. § 1.106, that the Petition for Reconsideration is GRANTED in part and DENIED in all other respects.

6. IT IS FURTHER ORDERED that Foster's Stereo Center must pay the forfeiture amount of five-thousand six-hundred dollars ($5,600) within thirty (30) days of receipt of this Order. Payment may be made by check or money order payable to the Federal Communications Commission.[1] Please place NAL/Acct. No. 315LA0135 on the remittance and mail it to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

7. IT IS FURTHER ORDERED that a copy of this Order shall be sent to Foster's Stereo Center and counsel.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

[1] Requests for installment plans should be mailed to: Chief, Billings and Collections, Mail Stop 1110A2, 1919 M Street, N.W., Washington, D.C. 20554. Payment of the forfeiture in installments may be considered as a separate matter in accordance with Section 1.1914 of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

David L. Wood NAL/Acct. No. 215ST0025
dba Cascade CB
Lynnwood, Washington

ORDER

Adopted: April 21, 1994; Released: May 4, 1994

By the Chief, Field Operations Bureau:

I. INTRODUCTION

1. Mr. David L. Wood filed a Petition for Reconsideration, requesting reconsideration of the monetary forfeiture of $2,000 issued for violation of Section 302(b) of the Communications Act of 1934, as amended (the Act), and Section 2.803 and 2.815(b) of the Commission's Rules. 47 U.S.C. Section 302(b); 47 C.F.R Sections 2.803 and 2.815(b). For the reasons noted below, the Bureau affirms the monetary forfeiture.

II. BACKGROUND

2. On August 10, 1992, the Federal Communications Commission's (FCC) Seattle Office issued a Notice of Apparent Liability (NAL) to Mr. Wood. The penalty was imposed for selling various types of CB radios and amplifiers that had not been authorized by the FCC. Based on the response from Mr. Wood, the FCC's Seattle Office issued a Notice of Forfeiture (NOF) for $2,000 on October 8, 1992. Mr. Wood now appeals. The petitioner denies that he improperly sold some CB radios, but admits some violations. He claims inability to pay.

III. DISCUSSION AND CONCLUSION

3. The arguments raised in the Petition for Reconsideration have been thoroughly considered and are incorporated herein by reference. Upon review of these arguments raised in the petition as well as review of the NAL and NOF, we find that the petitioner fails to present any new arguments or evidence that was not previously addressed or warrants a change in the forfeiture amount.

4. In a subsequent letter sent to the FCC by Mr. Wood on August 2, 1993, he admits that he sold some CB radio equipment that lacked FCC authorization. In imposing this penalty, Mr. Wood's financial condition was properly taken into account and no further reductions in the penalty are warranted.

IV. ORDERING CLAUSES

5. IT IS ORDERED THAT, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Section 1.106 of the Rules, 47 C.F.R. § 1.106, the petition for reconsideration is DENIED.

6. IT IS FURTHER ORDERED that Mr. Wood must pay the forfeiture amount of Two Thousand Dollars ($2,000) within thirty (30) days of receipt of this Order. Payment may be made by check or money order payable to the Federal Communications Commission.[1] Please place NAL/Acct. No. 215 ST 0025 on the remittance and mail it to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

Forfeiture penalties not paid within 30 days may be referred to the U.S. Attorney for recovery in a civil suit. 47 U.S.C. Section 504(a).

7. IT IS FURTHER ORDERED that a copy of this Order shall be sent to Mr. Wood and counsel.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

[1] Requests for installment plans should be mailed to: Chief, Billings and Collections, Mail Stop 1110A2, 1919 M Street, N.W., Washington, D.C. 20554. Payment of the forfeiture in installments may be considered as a separate matter in accordance with Section 1.1914 of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

The Maxximum Company
Nampa, Idaho

NAL/Acct. No. 315LA0070

ORDER

Adopted: April 21, 1994; **Released: May 4, 1994**

By the Chief, Field Operations Bureau:

I. INTRODUCTION

1. The Maxximum Company filed a Petition for Reconsideration, requesting reconsideration of the monetary forfeiture of $7,000 issued for violation of Section 302(b) of the Communications Act of 1934, as amended, (the Act), and Section 2.803 of the Commission's Rules. For the reasons noted below, the Bureau reduces the monetary forfeiture amount to $5,600.

II. BACKGROUND

2. On December 21, 1992, the Los Angeles Office issued a Notice of Apparent Liability (NAL) to The Maxximum Company. The penalty was imposed for offering for sale a Class B computing device peripheral which was not certified by the Commission. Based on the response from The Maxximum Company, the Los Angeles Office issued a Notice of Forfeiture (NOF) for $7,000 on January 28, 1993. The Maxximum Company now appeals. The petitioner contends that, while they did have a Class B computing device peripheral on display, they were, in fact, not offering to sell that device and had a sign posted stating that the device was "Not FCC Approved". They also state that the forfeiture will impose "undue hardship and bring imminent disaster" to the company.

III. DISCUSSION AND CONCLUSION

3. The arguments raised in the Petition for Reconsideration have been thoroughly considered and are incorporated herein by reference. The notice provided by Maxximum did not meet the requirement of Section 2.803 of the Rules. Without the requisite language in the notice accompanying the display, displaying the device constituted a violation of Section 2.803. Review of these arguments raised in the petition, as well as review of the NAL and NOF, reveals that the subject's prior history of compliance was not properly considered. Thus, the forfeiture amount will be reduced accordingly.

IV. ORDERING CLAUSES

4. IT IS ORDERED THAT, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Section 1.106 of the Rules, 47 C.F.R. § 1.106, the petition for reconsideration is GRANTED in part and DENIED in all other respects.

5. IT IS FURTHER ORDERED that The Maxximum Company must pay the forfeiture amount of Five Thousand Six Hundred Dollars ($5,600) within thirty (30) days of receipt of this Order. Payment may be made by check or money order payable to the Federal Communications Commission.[1] Please place NAL/Acct. No. 315LA0070 on the remittance and mail it to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

6. IT IS FURTHER ORDERED that a copy of this Order shall be sent to The Maxximum Company.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

[1] Requests for installment plans should be mailed to: Chief, Billings and Collections, Mail Stop 1110A2, 1919 M Street, N.W., Washington, D.C. 20554. Payment of the forfeiture in installments may be considered as a separate matter in accordance with Section 1.1914 of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Instant Page Incorporated
Flint, Michigan

NAL/Acct. No. 315DT0008

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

ORDER

Adopted: April 21, 1994; Released: May 4, 1994

By the Chief, Field Operations Bureau:

I. INTRODUCTION

1. Instant Page Incorporated filed a Petition for Reconsideration, requesting reconsideration of the monetary forfeiture of $1,000 issued for violation of Section 90.425 of the Commission's Rules, 47 C.F.R. § 90.425. For the reasons noted below, the Bureau cancels the monetary forfeiture amount.

II. BACKGROUND

2. On December 14, 1992, the Detroit Office issued a Notice of Apparent Liability (NAL) to Instant Page Incorporated. The penalty was imposed for failure to give station identification while operating a radio station on the frequency of 152.48 MHz. Based on the response from Instant Page Incorporated, the Detroit Office issued a Notice of Forfeiture (NOF) for $1,000 on January 25, 1993. Instant Page Incorporated now appeals. The petitioner contends that they were in the process of updating their computer equipment and in their attempts to retrieve their networking files and get subscribers back in service, the station ID was not confirmed. The next day, the FCC informed them that the station ID was not transmitted and the petitioner corrected the problem that day.

III. DISCUSSION AND CONCLUSION

3. The arguments raised in the Petition for Reconsideration have been thoroughly considered and are incorporated herein by reference. Upon review of the NAL and NOF, we find that the forfeiture was not imposed in accordance with FCC rules and the Act, and is hereby cancelled.

IV. ORDERING CLAUSES

4. IT IS ORDERED THAT, pursuant to Section 503(b) of the Act, U.S.C. § 503(b), and Section 1.106 of the Rules, 47 C.F.R. § 1.106, the petition for monetary forfeiture is hereby cancelled.

5. IT IS FURTHER ORDERED that a copy of this Order shall be sent to Instant Page Incorporated.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Brent Finnigan NAL/Acct. No. 315ST0006
Graham, Washington

ORDER

Adopted: April 21, 1994; Released: May 4, 1994

By the Chief, Field Operations Bureau:

I. INTRODUCTION

1. Counsel for Brent Finnigan (Petitioner) filed a Petition for Reconsideration, requesting reconsideration of the monetary forfeiture of $3,500 issued pursuant to Section 503, 47 U.S.C. §503, for violation of Section 301, 47 U.S.C. §301, of the Communications Act of 1934, as amended (the Act), and Section 15.29 of the Commission's Rules, 47 C.F.R. §15.29. For the reasons noted below, the Bureau reduces the monetary forfeiture.

II. BACKGROUND

2. On February 1, 1993, the Commission's Seattle Office issued a Notice of Apparent Liability (NAL) to Petitioner. The penalty was imposed for operating a radio transmitter on frequencies for which he held no license or other authorization from the Commission and failure to allow inspection of his station. Based on the response from Petitioner, the Seattle Office issued a Notice of Forfeiture (NOF) for $3,500 on February 24, 1993. Petitioner now appeals. Petitioner contends that he was not operating a transmitter on the date in question, that he is exempt from Section 301 requirements because his CB station is not required to be licensed, and that he refused to allow inspection of his station because inspectors lacked a search warrant and he was uncertain of their identity. He also claims to be exempt from the Section 15.29 inspection rule due to his exemption from Section 301 requirements.

III. DISCUSSION AND CONCLUSION

3. The arguments raised on Pages 1 through 3 of the Petition for Reconsideration have been thoroughly considered and are incorporated herein by reference. Upon review of these arguments raised in the petition as well as review of the NAL and NOF, we find that the petitioner presents numerous arguments all of which are unpersuasive and will be addressed individually below.

4. Petitioner contends that, as a CB radio operator who is not required to possess an individual station license, he is exempt from all licensing requirements. We find that argument unpersuasive. Section 307(e)(1) of the Act allows the Commission to permit operation of stations in the CB radio service[1] without individual licenses.[2] This authority is valid only when the party complies with all of the Commission's Rules governing the operation of CB radio stations (including maintaining the transmissions within one of the 40 authorized frequency channels). Since petitioner was using frequencies 27.455 and 27.415 MHz (frequencies outside of the authorized 40 CB radio channels), *he was not operating a CB radio station*. Commission records fail to confirm that Petitioner has a license or other authorization from the Commission for use of these frequencies.

5. Petitioner contends that he was operating a receiver, not a transmitter. We are unpersuaded by this contention. The transmissions were located and identified by close-in direction finding techniques.

6. Petitioner contends that the forfeiture was improperly issued because, in accordance with Section 503(b)(5) of the Act, no forfeiture is applicable unless a prior notice required by Section 503(b)(3) of the Act is given. This is incorrect. Section 503(b)(5) of the Act states also: "... The provisions of this paragraph shall not apply, however, if the person involved is engaging in activities for which a license, permit, or certificate, or other authorization is required..."[3]

7. Petitioner contends that he did not commit any willful violation. Section 312(f)(1), which also applies to Section 503(b), provides: "The term 'willful', when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States."[4] The transmissions made by Petitioner and recorded by Commission investigators were not accidental.

8. Lastly, we note that the Petitioner has not previously violated our rules and we will reduce the forfeiture amount accordingly.

IV. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED THAT, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Section 1.106 of the Rules, 47 C.F.R. § 1.106, the petition for reconsideration is GRANTED to the extent noted herein and in all other respects DENIED.

10. IT IS FURTHER ORDERED that Brent Finnigan must pay the forfeiture amount of two thousand, eight hundred dollars ($2,800) within thirty (30) days of receipt of this Order. Payment may be made by check or money

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[1] The CB radio service utilizes a band of 40 channels between 26.965 and 27.405 MHz. The rules governing the CB radio service are contained in the Code of Federal Regulations, Title 47, Part 95. *See* 47 CFR §§ 95.401-95.669.

[2] Operation of a CB station without an individual station license is permissible *only* when all of the rules governing the CB radio service are complied with. *See* CB Rule 4, 47 C.F.R. § 95.404.

[3] *See also* 47 C.F.R. § 1.80(d) which contains identical language.

[4] *See Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

order payable to the Federal Communications Commission.[5] Please place NAL/Acct. No. 315ST0006 on the remittance and mail it to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

11. IT IS FURTHER ORDERED that a copy of this Order shall be sent to Petitioner and counsel.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

[5] Requests for installment plans should be mailed to: Chief, Billings and Collections, Mail Stop 1110A2, 1919 M Street, N.W., Washington, D.C. 20554. Payment of the forfeiture in installments may be considered as a separate matter in accordance with Section 1.1914 of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ASLAN Computer Corporation
S. El Monte, California
Liability for Forfeiture

NAL/Acct. No. 215LA0010

ORDER

Adopted: April 21, 1994; Released: May 4, 1994

By the Field Operations Bureau:

I. INTRODUCTION

1. The Bureau has before it a Petition for Reconsideration filed by ASLAN Computer Corporation (ASLAN/Petitioner) pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, requesting reconsideration of the Bureau's July 31, 1992, action finding Petitioner liable for a monetary forfeiture in the amount of $7,000 for violating Section 302 of the Communications Act of 1934, as amended, 47 U.S.C. § 302 (the Act), and Section 2.803 of the Commission's Rules, 47 C.F.R. § 2.803.

2. For the reasons set forth below, we have reduced the amount of the forfeiture to $5,600.

II. BACKGROUND

3. On June 9, 1992, the Bureau issued a Notice of Apparent Liability to ASLAN based on its October 21, 1991, display and offer for sale of a Powertech Model SNB-1, 25 MHz laptop personal computer lacking the required FCC identification number and certification. ASLAN responded to the NAL on June 25, 1992, asserting that the displayed unit was not offered for sale, but was there solely for market testing. On July 31, 1992, the Bureau issued a Forfeiture Order finding ASLAN liable for a monetary forfeiture in the amount of $7,000.[1]

4. Petitioner argues that there was no violation of Section 2.803 of the Rules. According to Petitioner, it never intended to sell, advertise or offer the device for sale, but was simply engaged in "concept testing," or testing consumer reaction to a product to determine whether marketing of the product would be worthwhile. ASLAN also requested mitigation or cancellation of the forfeiture claiming that: it has been in business since 1988 and has no history of prior violation of Commission Rules; it acted in good faith, and is financially unable to pay the forfeiture. ASLAN argues that the business has lost money in the last two years, and that it is therefore unable to pay the full amount of the forfeiture. Petitioner has also submitted financial and other documents to support its claim that it is financially unable to pay.

III. DISCUSSION AND CONCLUSION

5. We have reviewed Petitioner's arguments and supporting documentation. We agree that Petitioner is entitled to a downward adjustment based on its history of compliance, and have reduced the forfeiture amount on this basis. We disagree, however, with Petitioner's argument that its display of a sign which indicated that the device was a "DEMO UNIT NOT FOR SALE" evidenced its good faith intention to comply with the Section 2.803 disclaimer provision. The disclaimer language required by Section 2.803 is very specific and intended to convey to the general public or prospective purchasers the fact that a particular device needs FCC authorization, does not have it, and cannot be sold or offered for sale until such authorization has been granted. The sign which Petitioner posted does not meet this standard.

6. We have also reviewed the financial documents and documents submitted by Petitioner. Petitioner submitted a copy of a 1992 tax return which showed gross profits, but ordinary income losses. Petitioner also submitted unreviewed and unaudited financial statements prepared by its accounting firm. These financial statements, however, do not present any reliable information regarding Petitioner's financial posture. The financial statement was prefaced by a cover letter wherein the accounting firm refused to provide any assurance of the financial statement's reliability. It also noted that "[the] compilation is limited to presenting, in the form of financial statements, information that is the representation of management. *We have not audited or reviewed the accompanying financial statements and, accordingly, do not express an opinion or any other form of assurance on them.*" (emphasis added).

7. In determining the amount of the forfeiture, the Commission's Policy regarding forfeiture adjustments, *see 1993 Policy Statement, Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993), was considered. We are reducing the amount of the monetary forfeiture penalty to $5,600. No further adjustments appear warranted.

8. IT IS ORDERED THAT, pursuant to Section 503(b) of the Communications Act of 1934 and Section 1.106 of the FCC's rules, the relief sought in the Petition for Reconsideration filed by ASLAN Computer Corporation is GRANTED in part and DENIED to the extent noted herein. 47 C.F.R. §§ 0.311, 1.106.

9. IT IS FURTHER ORDERED, pursuant to Section 1.80, 47 C.F.R. §1.80, that ASLAN Computer Corporation shall submit the $5,600 monetary forfeiture payment within 30 days of the receipt of this letter. Payment may be by check or money order payable to the Federal Communications Commission. Please place NAL number 215LA0010 on the remittance and send it to:

[1] Petitioner, through counsel, responded on June 25, 1992, requesting an extension of time in which to file either a Petition for Reconsideration or Application for Review. Since then, Petitioner retained new counsel and was granted another extension of time in which to respond.

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

10. IT IS FURTHER ORDERED that a copy of this Order shall be sent by certified mail, return-receipt requested, to ASLAN Computer Corporation and its attorney.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

The Micronesian Telecommunications Corporation — AAD 93-161

Request for a Declaratory Ruling

REPORT AND ORDER

Adopted: April 25, 1994; Released: May 4, 1994

By the Deputy Chief (Operations), Common Carrier Bureau:

I. INTRODUCTION

1. On April 7, 1993, Micronesian Telecommunications Corporation (MTC) requested a Declaratory Ruling that would authorize the establishment of a study area for the Commonwealth of the Northern Mariana Islands (CNMI) that would embrace MTC's operating territories on the islands of Saipan, Tinian and Rota.[1] We released a public notice soliciting comments on MTC's Request for Declaratory Ruling.[2] Comments and replies were filed.[3] In this Order, we find that the establishment of a study area for CNMI would serve the public interest, and therefore grant MTC's request for Declaratory Ruling.

II. BACKGROUND

2. A "study area" is a geographical segment of a carrier's telephone operation. Generally, a study area represents a carrier's entire operation within a state. Thus, carriers that operate in more than one state typically have one study area for each state, and carriers that operate in a single state have a single study area. Carriers perform their jurisdictional separations at the study area level. For jurisdictional separations purposes, the Commission froze study area boundaries effective November 15, 1984.[4]

3. In 1984, MTC's operating territories in the Northern Marianas were governed under a United Nations trusteeship and thus were not considered part of a specific study area. In 1986, when the Trusteeship terminated, the islands became a United States Commonwealth, known as the CNMI.

4. In 1992, the Commission held that the Territory of Guam and the Guam Telephone Authority (GTA) are subject to the Communications Act of 1934 (the Act), and that the Federal Communications Commission has exclusive jurisdiction over interstate and foreign common carrier communications that originate and terminate on the Territory of Guam.[5] The *IT&E Relief Order* also directed GTA to show cause why it should not file lawful exchange access tariffs with the Commission.[6]

III. PLEADINGS

5. MTC states that as a result of the Commission's decision in the *IT&E Relief Order* it will voluntarily tariff its interstate access services in CNMI.[7] MTC therefore asks that the Commission authorize the creation of a study area for CNMI. MTC states that such action is appropriate because the Commission's 1984 freeze on study area boundaries did not contemplate the Northern Marianas, since the islands had not yet achieved Commonwealth status. In addition, MTC requests that the Commission assign a "COSA" code[8] for the CNMI study area so that it can prepare and file a Tariff Review Plan, Form 492A, and ARMIS filings.

6 . USTA supports MTC's Request for Declaratory Ruling.[9] USTA argues that such a ruling is necessary because: (a) the Northern Mariana Islands had not achieved Commonwealth status when the study areas boundaries were frozen by the Commission; and (b) MTC now seeks to file an access tariff in order to comply with the Commission's decision in the *IT&E Relief Order*. USTA also contends that MTC's request is in the public interest and that the Commission's study area rule should be waived to permit MTC to establish a study area to encompass its service area.

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[1] MTC provides local exchange service, interexchange access services, and off-island long distance telephone service to the CNMI. MTC is a 96% owned subsidiary company of the GTE Hawaiian Telephone Company, which is owned by the GTE Corporation.

[2] Public Notice, 9 FCC Rcd 331 (Com. Car. Bur. 1994).

[3] Comments were filed by the United States Telephone Association (USTA) and an Opposition was filed by IT&E Overseas, Inc. (IT&E). MTC filed Reply Comments. IT&E filed on Opposition out of time and in violation of the Commission's rules. *See* 47 C.F.R. §§ 1.45, 1.46. Accordingly, IT&E's Motion For Leave To File Late Comments out of time is dismissed as untimely.

[4] *See* MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, 49 Fed. Reg. 48325 (Dec. 12, 1984)(*1984 Joint Board Recommended Decision*), adopted by the Commission, 50 Fed. Reg. 939 (Jan.8 , 1985)(*1985 Order Adopting Recommendation*). *See also* Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, Notice of Proposed Rulemaking, 5 FCC Rcd 5974 (1990)(*Study Area Notice*). The Commission therein describes the factors that led to the present restriction on study area changes and the reasons why it is proposing to change that restriction.

[5] *See* IT&E Overseas, Inc. and PCI Communications, Inc., Petition for Emergency Relief and Expedited Declaratory Ruling, 7 FCC Rcd. 4023 (1992)(hereinafter, *IT&E Relief Order*).

[6] *Id.* at 4026.

[7] MTC Request for Declaratory Ruling at 2. On April 19, 1993, MTC filed a tariff with the Commission for interstate access services in CNMI. *See* FCC Transmittal No. 783 (filed Apr. 19, 1993). MTC's tariff took effect on June 17, 1993. Under this tariff, MTC provides interstate access services as the issuing carrier for the GTE domestic telephone companies' (GTOC) interstate access Tariff FCC No. 1.

[8] "COSA" is a contraction of *Company Study Area*, and the code for a company study area is a unique identifier for that study area.

[9] USTA Comments at 1-2.

IV. DISCUSSION

7. The Commission froze all local exchange carrier study area boundaries for separations purposes as they existed on November 15, 1984.[10] The Commission took such action, in part, to ensure that local exchange companies do not set up high cost exchanges within their existing service territory as separate companies to maximize high cost support.[11]

8. We conclude, based on the record before us, that the Commission's reasons for freezing study area boundaries would not be compromised by authorizing a new study area for MTC in the CNMI. The study area freeze was adopted to prevent companies from disaggregating and recombining study areas, and portions thereof, to increase interstate revenue requirements, and compensation, through the manipulation of study area boundaries. That obviously is not the case here. Moreover, since the Commission adopted the Joint Board's recommendation, the CNMI has become a Commonwealth of the United States. Under these circumstances, granting a waiver to establish MTC as a separate study area will facilitate the orderly administration of the Commission's responsibilities under Communications Act. We therefore find that it will be in the public interest to establish a study area for MTC that is coterminous with the geographic boundaries of the CNMI, and assign COSA code "GTMC" for the purpose of MTC's ARMIS, Form 492A, and Tariff Review Plan filings.

V. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c), and Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the Request for Declaratory Ruling of the Micronesian Telephone Company to authorize the establishment of a study area for the Commonwealth of the Northern Mariana Islands IS GRANTED to the extent stated herein.

10. IT IS FURTHER ORDERED that MTC SHALL USE COSA Code "GMTC" in its numerical filings with this Commission.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief (Operations)
Common Carrier Bureau

[10] *See 1985 Order Adopting Recommendation*, 50 Fed. Reg. 939.
[11] *Id.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

David C. Quistad NAL/Acct. No. 215FE0141
Colville, Washington

ORDER

Adopted: April 21, 1994; Released: May 4, 1994

By the Chief, Field Operations Bureau:

I. INTRODUCTION

1. David C. Quistad filed a Petition for Reconsideration, requesting reconsideration of the monetary forfeiture of $500 issued for violation of Section 301 of the Communications Act of 1934, as amended (the Act). For the reasons noted below, the Bureau reduces the monetary forfeiture amount to $100.

II. BACKGROUND

2. On June 22, 1992, the Ferndale Office issued a Notice of Apparent Liability (NAL) to David C. Quistad. The penalty was imposed for unlicensed radio station operation on Marine Channel 28. Based on the response from David C. Quistad, the Ferndale Office issued a Notice of Forfeiture (NOF) for $500 on July 13, 1992. David C Quistad now appeals. The petitioner contends that he previously held a valid marine license but that he had not noticed that it had expired. Also, he explained that he rarely uses his radio. Mr. Quistad stated that he is very responsible and "eager to comply with all laws, rules and policies, and willing to take the steps necessary to correct his shortcomings and trespasses".

III. DISCUSSION AND CONCLUSION

3. The arguments raised in the Petition for Reconsideration have been thoroughly considered and are incorporated herein by reference. Review of these arguments raised in the petition as well as review of the NAL and NOF, reveals, that the petitioner fails to raise any issues to warrant mitigation or cancellation of the fine. However, upon further review, we find that this type of violation warrants a forfeiture of an amount less than that envisioned by the *Policy Statement. 1993 Policy Statement,* 8 FCC Rcd 6215 (1993). Thus, the forfeiture amount will be reduced accordingly.

IV. ORDERING CLAUSES

4. IT IS ORDERED THAT, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Section 1.106 of the Rules, 47 C.F.R. § 1.106, the petition for reconsideration is GRANTED in part and DENIED in all other respects.

5. IT IS FURTHER ORDERED that David C. Quistad must pay the forfeiture amount of One Hundred Dollars ($100) within thirty (30) days of receipt of this Order. Payment may be made by check or money order payable to the Federal Communications Commission.[1] Please place NAL/Acct. No. 215FE0141 on the remittance and mail it to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

6. IT IS FURTHER ORDERED that a copy of this Order shall be sent to David C. Quistad.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

[1] Requests for installment plans should be mailed to: Chief, Billings and Collections, Mail Stop 1110A2, 1919 M Street, N.W., Washington, D.C. 20554. Payment of the forfeiture in installments may be considered as a separate matter in accordance with Section 1.1914 of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

GN Docket No. 93-252

In the Matter of

Implementation of Sections 3(n) and 332
of the Communications Act

Regulatory Treatment of Mobile Services

ERRATUM

Released: March 30, 1994

1. This *Erratum* corrects the final rules in the *Second Report and Order* in the above captioned proceeding, FCC 94-31, which was released on March 7, 1994. The rules will be published correctly in the Federal Register.

2. Section 20.17 is corrected to read as follows.

§ 20.17 Requirements under Title II of the Communications Act.

* * * * * *

(b) Commercial mobile radio service providers are not required to:

(1) File with the Commission copies of contracts entered into with other carriers or comply with other reporting requirements, or with sections 1.781-1.814 and 43.21 of this chapter;

(2) Seek authority for interlocking directors (section 212 of the Communications Act);

(3) Submit applications for new facilities or discontinuance of existing facilities (Section 214 of the Communications Act);

(c) Commercial mobile radio service providers shall not file tariffs for interstate service to their customers, or for interstate access service. Sections 1.771-1.773 and Part 61 of this chapter are not applicable to interstate services provided by commercial mobile radio service providers. Commercial mobile radio service providers shall cancel tariffs for interstate service to their customers and interstate access service.

(d) Nothing in this section shall be construed to modify the Commission's rules and policies on the provision of international service under Part 63 of this chapter.

FEDERAL COMMUNICATIONS COMMISSION

A. Richard Metzger, Jr.,
Acting Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-291

In the Matter of

Amendment of Section 76.51
of the Commission's Rules
to Include Lawrence,
Massachusetts, in the Boston-
Cambridge-Worcester,
Massachusetts, Television Market

REPORT & ORDER
(Proceeding Terminated)

Adopted: April 29, 1994; Released: May 5, 1994

By the Chief, Cable Services Bureau:

1. Before the Commission is the *Notice of Proposed Rule Making* in MM Docket No. 93-291, 8 FCC Rcd 8171 (1993) (*"Notice"*) issued in response to a petition filed by MFP, Inc. ("Petitioner"), licensee of television station WMFP(TV), Channel 63 (Independent), Lawrence, Massachusetts, to amend Section 76.51 of the Commission's Rules, 47 C.F.R. §76.51, to add Lawrence as a designated community in the Boston-Cambridge-Worcester, Massachusetts, television market. The petitioner filed comments underscoring the facts addressed in its petition, and urging the adoption of its rulemaking proposal.[1]

2. In the *Notice*, we concluded that a sufficient case for redesignation of the subject market had been set forth such that the proposal should be tested through the rulemaking process. After reviewing the record in this proceeding, we believe that Section 76.51 should be updated by renaming the Boston-Cambridge-Worcester, Massachusetts, television market the Boston-Cambridge-Worcester-Lawrence, Massachusetts, market. Lawrence is currently part of the Boston ADI and the "Boston-Lawrence-Salem, MA/NH" Consolidated Metropolitan Statistical Area. Moreover, the petitioner has demonstrated that WMFP's coverage area conforms closely to other stations in the designated market communities and that other area media treat WMFP as being in the Boston market. WMFP's transmitter is located within Boston and, although distance from other communities in a market is not, of itself, determinative, we are influenced in this instance not only by the relatively short distance of Lawrence from Boston (25 miles) but, additionally, by the fact that this is less than the distance from Boston of another designated community in the market (Worcester).

3. From the information before us, therefore, it appears that WMFP and stations licensed to communities in this television markets do compete for audiences and economic support throughout much of the combined market area, and that sufficient evidence had been presented tending to demonstrate commonality between the proposed community to be added to a market designation and the market as a whole. For these reasons we believe that amendment of Section 76.51 as requested by the petitioner is consistent with the procedures outlined in Section 4 of the Cable Television Consumer Protection and Competition Act of 1992,[2] which amended Section 614(f) of the Communications Act of 1934, and will serve the public interest by meeting the underlying purposes of the market hyphenation rule to equalize competition among stations in genuine competition. *See, e.g., Major Television Markets (Fresno-Visalia, California)*, 57 RR 2d 1122 (1985).

4. Accordingly, pursuant to authority delegated in Section 0.321 of the Commission's Rules, IT IS ORDERED that, effective thirty (30) days after publication in the Federal Register, Section 76.51(b) of the Commission's Rules, Major Television Markets, IS AMENDED to include Lawrence, Massachusetts, as follows:

Boston-Cambridge-Worcester-Lawrence, Massachusetts

5. IT IS FURTHER ORDERED, that this proceeding IS TERMINATED.

6. For further information on this proceeding, contact Alan E. Aronowitz, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

[1] In its comments, the petitioner asserts that the instant proposal, although involving one of the nation's largest markets, is nevertheless distinguishable from the issues raised in other proceedings involving large markets. *See Notice of Proposed Rule Making* in MM Docket No. 93-290 (Newton, New Jersey and Riverhead, New York), 8 FCC Rcd 8136 (1993). *See also Notice, supra*, at 8173, n.14. It maintains that the two communities seeking inclusion in the New York television market are located farther from the core of that market, and even farther away from each other, that alternatives to market hyphenation may be appropriate when considering stations clearly at "opposite ends" of a large ADI market area. However, because Lawrence is not at the "fringe" of the Boston ADI, and is significantly closer to Boston than Newton or Riverhead are to New York City, the petitioner contends that the concerns raised in the New York proceeding are not present in this case.

[2] Pub. L. No. 102-385, 106 Stat.1460 (1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Star Tel Transmission Co. Inc.
Transferor,

File No. I-T-C-93-342-TC

and

Vadacom, Inc.
Transferee,

Application for authority pursuant to Section 214 of the Communications Act of 1934, as amended, for authority to transfer control of international resale common carrier.

MEMORANDUM OPINION AND ORDER

Adopted: April 20, 1994; Released: May 6, 1994

By the Chief, International Facilities Division:

1. On September 24, 1993, Star Tel Transmission Co. Inc. (Star Tel) and Vadacom, Inc. (Vadacom) (collectively "the Applicants") filed the above-captioned application pursuant to Section 214 of the Communications Act of 1934, as amended, and Section 63.01 of the Commission's Rules requesting authority to transfer control of Star Tel from Milton A. Seale, Robert A. Seale, C.W. Alcorn, Jr., and William S. Fly, to Vadacom. The application was supplemented on October 7, 1993, and placed on public notice on October 13, 1993. No comments were received.

2. Star Tel, a Texas corporation, is 100 percent owned by Milton A. Seale, Robert A. Seale, C.W. Alcorn, Jr., and William S. Fly. Star Tel's principal business is the provision of telecommunication services to the public. Star Tel is authorized to provide international message toll service (IMTS) solely through the resale of the switched voice services of AT&T, MCI, US Sprint, and Satellite Business Systems.[1]

3. Vadacom, a Texas corporation, also is engaged in a broad range of telecommunications activities including the provision of intrastate, interstate and international telecommunications service to the public. Vadacom is authorized to provide IMTS solely through the resale of the switched voice services of MCI and Worldcom.[2]

4. The Applicants request authorization for a transfer of control pursuant to an agreement entered into between the two carriers on May 31, 1993, whereby Vadacom would acquire all of the stock of Star Tel. However, on October 7, 1993, the Applicant's counsel voluntarily informed the Commission by letter that on August 13, 1993, the agreement was consummated and became effective immediately without prior Commission approval. The Applicants state that they did not realize until consulting with counsel after the transfer that prior Commission approval was required. The Applicants state that they regret this oversight. They state that now that they are aware of the requirements of the Communications Act of 1934, as amended, and the Commission's rules, they are committed to complying with these obligations.

5. The Applicants state that a grant of this application will serve the public interest. By providing Star Tel access to Vadacom's marketing, technical and financial capabilities, the Applicants state that Star Tel will be able to enhance its offerings and become a more effective competitor in the international resale market. This will benefit the public by the introduction of more diverse services, as well as significant operating efficiencies and service quality improvements.

6. In view of the foregoing, we conclude that consent to the transfer of control of Star Tel's Section 214 authorization, from Milton A. Seale, Robert A. Seale, C.W. Alcorn, Jr., and William S. Fly, to Vadacom will not adversely affect the public interest. However, our finding here is without prejudice to any further action the Commission might take with respect to the Applicants' consummation of the transfer of control without prior Commission approval.

7. Accordingly, IT IS ORDERED, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, and Section 63.01 of the Commission's Rules, 47 C.F.R. § 63.01, that the application of Star Tel Transmission Co. Inc. and Vadacom, Inc., File No. I-T-C-93-342-TC, IS GRANTED and we consent to the transfer of control from Milton A. Seale, Robert A. Seale, C.W. Alcorn, Jr., and William S. Fly, to Vadacom of the international Section 214 authorization held by Star Tel, which was originally granted in File No. I-T-C-87-085. However, this authorization is without prejudice to any further action the Commission might take with respect to the Applicants' consummation of the transfer of control without prior Commission approval.

8. IT IS FURTHER ORDERED, pursuant to Section 203 of the Communications Act, as amended, 47 U.S.C. § 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, that Star Tel must continue to maintain tariffs for the services authorized in this order.

9. IT IS FURTHER ORDERED that Star Tel must file annual reports of overseas telecommunications traffic as required by Section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61.

10. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services the Applicants seek authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

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[1] *Star Tel Transmission Company, Inc.*, File No. I-T-C-87-085, 2 FCC Rcd 2506 (1987).
[2] *Strategic Alliances Inc. et al.*, 8 FCC Rcd 2210 (1993).

11. This order is issued under Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules, 47 C.F.R. §§ 1.106, 1.115, may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2), 47 C.F.R. § 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CNI Wireless, Inc. File No. 2214-CM-P-92

An Application for Authority
to Construct and Operate a
Multichannel Multipoint Distribution
Service Station on the E-group Channels
at Parkers Lake, Kentucky

ORDER ON RECONSIDERATION

Adopted: April 26, 1994; Released: May 6, 1994

By the Chief, Domestic Facilities Division:

INTRODUCTION

1. CNI Wireless, Inc. (CNI) filed a petition for reconsideration of the return by the Domestic Facilities Division (Division) on delegated authority of the above-captioned Multichannel Multipoint Distribution Service (MMDS) application for the E-group channels at Parkers Lake, Kentucky, and requested reinstatement of the application.

II. BACKGROUND

2. CNI's application was filed on February 26, 1992. Subsequently, Division staff initiated a preliminary review of the application, pursuant to 47 C.F.R. Secs. 21.13, 21.15, 21.17, 21.20 and 21.26. An examination disclosed that CNI's application was defective, and thus unacceptable for filing.[1] Consequently, on October 6, 1993, CNI's application was returned, pursuant to Sec. 21.20(a).[2]

3. The Division's return was based, in part, on the determination that CNI's application was filed past the cut-off period established by the February 18, 1992 filing of adjacent and cochannel applications at Oneida, Tennessee. 47 C.F.R. Sec. 21.914. The proposed site for the Oneida station transmitters is within 23.6 miles of the transmitter site proposed by CNI at Parkers Lake. More than 100 MMDS applications, all specifying the same transmitter location, were filed to serve Oneida, Tennessee. Because the Parkers Lake and Oneida stations could potentially cause harmful electrical interference to each other if station transmitters operated at their respective geographic sites, the Division found that the application of CNI was filed after the requisite cut-off date. 47 C.F.R. Secs. 21.31 and 21.914.[3] Thus, the application was returned pursuant to 47 C.F.R. Sec. 21.20(c).

4. In addition, CNI's application also was returned because its proposed transmitter site is within 50 miles of the previously-proposed, pending application of Commonwealth Telecommunications, Inc. at Berea/Madison, Kentucky, in violation of Section 21.901(d)(4).

5. Further, the application filed by CNI also was returned based upon the fact that CNI filed inadequate interference analyses relating to the F-group channel applicants, all with the same geographic coordinates, at Somerset, Kentucky, as required by Section 21.902(c). Additionally, CNI failed to serve these potentially affected parties, as required by Section 21.902(g).[4]

III. DISCUSSION

6. *Somerset Applications.* CNI asserts, contrary to the Division's return notification, that it did in fact file interference analyses against the lottery-winning MMDS application of Agnes Kozel at Somerset, Kentucky, as well as the twenty-one lottery-losing applications at Somerset, as required by Section 21.902(c).[5]

7. We acknowledge that CNI did file interference analyses against Agnes Kozel's lottery-winning application at Somerset and note that CNI did list the names and file numbers of the twenty-one lottery-losing applications in the interference analyses filed with its application. However, the analyses filed against Agnes Kozel and the lottery-losing applicants were incomplete and insufficient. The proposed transmitter site at Somerset is within 19.93 miles of the site proposed by CNI at Parkers Lake. However, CNI failed to provide an adequate and complete demonstration of a lack of harmful interference, as required by Sec. 21.902.

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[1] Specifically, CNI's application was returned, as defective for the following reasons: (1) Application filed past cut-off period established in 47 C.F.R. Secs. 21.31 or 21.914; (2) Area proposed not open for filing pursuant to 47 C.F.R. Sec. 21.901(d)(4) as it did not meet the criteria established in Public Notice, 3 FCC Rcd 2661 (1988), which specifically states that an applicant may not file in a geographic area of an authorized or pending MMDS application; and (3) Inadequate interference analysis pursuant to 47 C.F.R. Sec. 21.902 due to failure to serve all affected parties pursuant to Sec. 21.902(g) and/or failure to consider all previously-proposed or authorized ITFS or MMDS station(s) pursuant to Secs. 21.902(c) and/or 21.902(i).

[2] *See* Public Notice, Report No D-716A (October 6, 1993).

[3] Pursuant to Section 21.31(a) of the Commission Rules, "[A]pplications will be mutually-exclusive if their conflicts are such that the grant of one application would effectively preclude by reason of harmful electrical interference... the grant of one or more of the other applications."

Further, Section 21.914 provides that in order to be entitled to be included in a random selection process or to comparative consideration with one or more conflicting applications, an application must be received by the Commission in a condition acceptable for filing on the same calendar day as the first of the conflicting applications is received by the Commission in a condition acceptable for filing.

[4] The applications at issue here at Parkers Lake, Oneida, Berea/Madison, and Somerset are at sites greater than 15 miles from the borders of any MSA and are not part of a designated MSA.

[5] All applicants at Somerset proposed construction of their respective stations at the same geographic coordinates.

8. Section 21.902(c)(2) requires that an applicant initially file with the application an analysis of the potential for harmful interference with any authorized or previously proposed adjacent channel stations within the radio horizon of the applicant's proposed transmitting antenna. Section 21.902(f)(2) of the Commission's Rules states that a lack of harmful interference to adjacent stations is demonstrated with calculations of a desired to undesired signal ratio greater than or equal to 0 dB. Here, CNI's analysis was inadequate as it failed to include the required calculations in the interference studies for all previously-proposed adjacent channel applicants, including the application of Agnes Kozel, at Somerset. In addition, while CNI served Agnes Kozel with a copy of its application and analysis, it failed to serve the remaining Somerset applicants with a copy of its interference analyses, as required by to Section 21.902(g).[6] Therefore, based upon CNI's failure to comply with Section 21.902, the Division's finding, that CNI's application was defective and unacceptable for filing, was proper.

9. *Commonwealth's Application at Berea/Madison.* CNI also maintains that the Division erred in its determination that it violated Section 21.901(d)(4) in that it filed within 50 miles of an authorized station or pending application. CNI claims that its proposed station was not within 50 miles of a *pending* application because the application at issue, filed by Commonwealth Telecommunications, Inc., was a lottery-losing application which should have been dismissed months before CNI's application was filed.[7] However, there is no dispute as to the fact that the Berea application had not yet been dismissed and remained pending on the date CNI's application was filed. Thus, there was no error in the Division's decision with respect to CNI's selection of a transmitter site within 50 miles of a previously-proposed and *pending* application.

10. *Oneida Applications:* CNI also contends that the return of its application was erroneous with regard to the Oneida applications and submits that "the Commission, rather than CNI, has failed to accurately comply with its own rules and stated policies."[8] CNI concedes that the Oneida applications were filed before its application, but maintains that CNI's application should not have been returned as the Commission had not yet determined the acceptability of the Oneida applications. Moreover, CNI argues that, based on its own analysis and review of a number of the applications filed for Oneida, the Commission, in effect, established an application cut-off period based on the date that Oneida applications were filed, even though the applications are, according to CNI, unacceptable for filing.[9] Further, CNI asserts that even if the Oneida applications were found to be acceptable for filing, CNI could not have conducted interference analyses against the Oneida applications, which were filed eight days prior to CNI's file date, because CNI was not aware of the filing of the Oneida applications.[10] Under these circumstances, CNI requests a waiver of the interference analysis requirements.[11]

11. These mutually-exclusive applications may have been considered together, but were not, because CNI's application was filed eight (8) days after the Oneida applications. CNI claims that it failed to include the Oneida applications in its analysis because it had no knowledge of these applications because of the short period of time between the Oneida and Parkers Lake filings. However, after the filing of its application, and prior to our consideration of its application, CNI should have monitored application filings to ensure that its application was complete and had considered all previously-proposed applications. The technical declaration relating to the Oneida applications submitted by CNI along with its reconsideration petition fails to comply with the requirements of Section 21.902.

12. Consistent with CNI's argument, we acknowledge that the applications filed for Oneida were determined to be defective.[12] However, while we may find on reconsideration that CNI may not have violated Section 21.914 and been "cut-off" because of the determination that the Oneida applications are not in a condition acceptable for filing for purposes of Section 21.914, CNI should have filed interference analyses for the then-pending Oneida applications as required by Section 21.902(c). Thus, even if CNI's application was not cut-off as to the Oneida applications, CNI violated the requirements of Sections 21.902(a), (b),

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[6] Section 21.902(g) provides that all interference studies submitted shall be served on all licensees and permittees of, and applicants for the stations considered in such studies. This service shall occur on or before the date of submission and a list of all parties so serviced shall be submitted with the study. CNI concedes its failure to serve and in fact filed a waiver of the service requirements. However, CNI did not provide adequate justification or a compelling argument to support the grant of a waiver of the service rule. Therefore, the waiver request was denied.

[7] Commonwealth's application was dismissed March 18, 1992, after CNI's application was filed. *See* Public Notice, Report No. D-636 (March 25, 1992). CNI argues that because the lottery-winning application, Affiliated Communication, Inc. (Affiliated) at Berea/Madison, was granted on September 23, 1991, Commonwealth's lottery-losing application should have been dismissed simultaneously, and therefore, CNI was not required to demonstrate non-interference to Commonwealth's application. However, inasmuch as Commonwealth's application had not been dismissed, CNI was required to consider Commonwealth's pending application in its interference analyses. This failure, combined with other significant defects, provides support for the return of CNI's application.

[8] Petition for Reconsideration at 3.

[9] CNI maintains that the Oneida MMDS applications are unacceptable for filing because the proposed Oneida transmitter site is within 50 miles of cochannel MMDS station applications filed prior to April 20, 1988.

[10] However, in the Declaration and Technical Statement accompanying this reconsideration petition, while not providing a complete interference analysis, CNI states that because its proposed transmit site is 23.6 miles from the proposed Oneida, TN transmitter location, there may be the potential for cochannel electromagnetic interference, and based on the typical transmission configurations proposed in MMDS applications, these applications could be considered mutually-exclusive.

[11] CNI requests a waiver of the interference analyses requirement, but provides no statement to justify its request, including a "lack of a reasonable alternative", as required by Section 21.19. We note that CNI failed to include the required interference analyses with its reconsideration petition. Further, CNI's application, as originally filed, was not accompanied by a waiver request, as required by Section 21.20(c)(1). For these reasons, CNI's waiver request is insufficient, and, is therefore denied.

[12] The applications filed for Oneida, Tennessee were returned on April 25, 1994.

and (c). Consequently, reinstatement is not justified based upon the fact that there are other defects in CNI's application.

13. Having carefully considered all of the arguments and evidence presented, we find that it was proper for the Division to return CNI's application. Reconsideration and reinstatement of the application is not warranted. Accordingly, IT IS ORDERED that the reconsideration petition filed by CNI Wireless, Inc. IS DENIED. This order is issued pursuant to 47 C.F.R. Sec. 0.291, and is effective on its release date. *See* 47 C.F.R. Sec. 1.4(b), 1.106, and 1.115.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 93-6

In the Matter of

Safeguards to Improve the Administration of the Interstate Access Tariff and Revenue Distribution Processes — RM 7736

ORDER EXTENDING WAIVER

Adopted: April 29, 1994; Released: May 6, 1994

By the Acting Chief, Common Carrier Bureau:

I. INTRODUCTION

1. This order extends the existing waiver of Section 69.602 of the Commission's Rules[1] permitting the addition of two directors from outside the telephone industry to the Board of Directors of the National Exchange Carrier Association, Inc. (NECA). This waiver covers the period between January 1, 1995, and December 31, 1995. We are extending the waiver on our own motion.

II. BACKGROUND

2. Section 69.602 of the Commission's Rules specifies that NECA's Board shall consist of fifteen directors, of whom three are to be selected by and represent the Bell Operating Companies, three are to be selected by and represent other telephone companies having annual operating revenues in excess of $40 million, and nine are to be selected by and represent telephone companies having annual operating revenues of less than $40 million. These directors generally are elected for one-year terms that begin on the January 1 following their election.

3. In a November 9, 1990, letter to NECA,[2] the Commission determined that several NECA directors had apparently participated in an improper attempt to manage the earnings of NECA's common line pool for 1988. To provide a moderating effect on Board deliberations, the Commission stated its intention to consider expanding the NECA Board to include two or more members from outside the local exchange carrier (LEC) industry. In response to the Commission's *November 9 Letter*, NECA filed a petition for waiver and a petition for rulemaking to include two outside directors on NECA's Board of Directors. NECA's petition for waiver proposed the expansion on an interim basis, beginning January 1, 1992, and extending it until the Commission rules on NECA's petition for rulemaking[3] to make the Board expansion permanent.

4. On September 13, 1991, the Common Carrier Bureau granted NECA's petition for waiver to include two directors from outside the telephone industry on the 1992 NECA Board of Directors.[4] The Bureau later extended voting membership on all NECA committees to the two outside directors.[5] On April 21, 1992, NECA filed a petition to extend this waiver pending final resolution of the petition for rulemaking. That waiver was granted by the Bureau on July 7, 1992, for the January 1, 1993 - December 31, 1993 term only.[6]

5. The Commission released a Notice of Proposed Rulemaking (NPRM) in the above-captioned docket on February 11, 1993. Part of the NPRM considers whether the Commission should amend Section 69.602 of the Commission's Rules to permit two directors from outside the telephone industry to serve on NECA's Board.[7] The Commission received sixteen comments[8] and five reply comments[9] to the NPRM. All parties favored the permanent inclusion of outside directors on NECA's Board. Because the issues raised in the NPRM had not been resolved, on July 6, 1993, the Bureau issued an Order extending the waiver to include two directors from outside the telephone industry for the January 1, 1994, through December 31, 1994, term.[10]

III. DISCUSSION

6. In granting the waivers for 1992 through 1994, we stated that a waiver of Section 69.602 would serve the public interest and that the addition of two directors from outside the telephone industry might provide increased assurance that NECA properly discharges its obligations

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[1] 47 C.F.R. § 69.602.

[2] Letter from Donna R. Searcy, Secretary, FCC, to Lawrence C. Ware, Chairman of the Board of Directors, 5 FCC Rcd 7183 (1990) (*November 9 Letter*).

[3] *See* NECA Petition for Rulemaking, RM 7736, filed May 24, 1991.

[4] Expansion of the NECA Board to Include Two Directors from Outside the Telephone Industry, 6 FCC Rcd 5403 (Com. Car. Bur. 1991).

[5] National Exchange Carrier Association, Inc., Expansion of Voting Membership on Voluntary Access Tariff Committees, 7 FCC Rcd 2050 (Com. Car. Bur. 1992).

[6] Expansion of NECA Board to Include Two Directors from Outside the Telephone Industry, 7 FCC Rcd 4401 (Com. Car. Bur. 1992).

[7] The NPRM also seeks comment on methods to improve the interstate access tariff and revenue distribution processes administered by the National Exchange Carrier Association, Inc.

[8] The commenters to the NPRM are the ALLTEL Service Corporation (ALLTEL), Anchorage Telephone Utility (ATU), American Telephone and Telegraph Company (AT&T), Ameritech Operating Companies (Ameritech), Bell Atlantic Telephone Companies (Bell Atlantic), Cathey, Hutton & Associates, Inc., General Communication, Inc. (GCI), ICORE, Inc. (ICORE), National Association of Regulatory Utility Commissioners (NARUC), NECA, the National Telephone Cooperative Association (NTCA), the Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO), Southwestern Bell Telephone Company (SWBT), John Staurulakis, Inc. (JSI), United States Telephone Association (USTA), and VTA Member Companies.

[9] ICORE, Inc. (ICORE), NECA, National Telephone Cooperative Association (NTCA), Southwestern Bell Telephone Company (SWBT), and United States Telephone Association (USTA) filed replies.

[10] Expansion of NECA Board to Include Two Directors from Outside the Telephone Industry, 8 FCC Rcd 7580 (Com. Car. Bur. 1993).

under the Commission's Rules. There is evidence that the participation of two outside directors on the NECA board has been beneficial and that the two directors elected for the 1994 term have provided a valuable perspective and balance to the Board. Because NECA must begin the process of selecting its 1995 Board of Directors soon, we believe that a one-year extension of the current waiver is appropriate to allow NECA's elections to proceed without disruption. We, therefore, authorize the additional directors for the January 1, 1995, through December 31, 1995, term.[11] In addition, we grant the two outside directors voting membership on all NECA committees for the 1995 term.

IV. ORDERING CLAUSE

7. Accordingly, pursuant to the authority contained in Sections 1, 4(i), 201-205, 218-220, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§151, 154(i), 201-05, 218-20, and 403, and Sections 0.91(a) and O.291 of the Commission's Rules, 47 C.F.R. §§0.91(a) and 0.291, IT IS ORDERED that Section 69.602 of the Commission's rules, 47 C.F.R. §69.602 IS HEREBY WAIVED to the extent stated herein.

FEDERAL COMMUNICATIONS COMMISSION

A. Richard Metzger, Jr.
Acting Chief, Common Carrier Bureau

[11] The action we are taking in this order is not intended in any way to prejudge the outcome of the rulemaking.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: May 6, 1994

UNITED UTILITIES, INC. FILE A PETITION FOR WAIVER OF THE DEFINITION OF "STUDY AREA" CONTAINED IN PART 36, SUBPART H, APPENDIX-GLOSSARY OF THE COMMISSION'S RULES
AAD 94-58

Comment Date: May 24, 1994
Reply Date: June 8, 1994

On April 20, 1994, United Utilities, Inc. (United) filed a petition for waiver of the definition of "Study Area" as set forth in Appendix-Glossary of Part 36 of the Commission's Rules. This waiver would allow United to reflect the change in its study area boundary that would result from the incorporation of four remote locations within its existing study area. United states that the Alaska Public Utilities Commission has approved its request to provide service to those subscribers.

Interested parties may file comments on this petition for waiver on or before **May 24, 1994**, and reply comments on or before **June 8, 1994**, with the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554. Comments and reply comments should reference AAD 94-58. Four (4) copies should also be sent to Adrian Wright, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554, and one (1) copy should be sent to the Commission's contractor for public service records duplication: International Transcription Service (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the petition may be obtained from the Accounting and Audits Division's public reference room, 2000 L Street, N.W., Room 812, Washington, D.C.; copies are also available from ITS at (202) 857-3800.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally*, 47 C.F.R. §§ 1.1200-1.1216. For further information contact Adrian Wright at (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Request for Waiver of Section 97.313(b)
of the Commission's Rules Governing
Transmitter Power Standards in the
Amateur Service.

MEMORANDUM OPINION AND ORDER

Adopted: April 26, 1994; Released: May 6, 1994

By the Commission:

1. On April 5, 1993, the Chief, Private Radio Bureau denied a request, filed by Mr. Dale Gagnon, for waiver of Section 97.313(b) of the Commission's Rules, 47 C.F.R. § 97.313(b). Mr. Gagnon had requested permission for his amateur station to transmit at power levels greater than the 1,500 watts authorized by our rules. On May 12, 1993, Mr. Gagnon filed a timely Application for Review of the Bureau Chief's denial. For the reasons discussed below, we affirm the staff's denial of the waiver request.

2. Mr. Gagnon states that he needs higher power than the rules permit in order to engage in long-distance communications. He also seeks to avoid the cost of bringing his vintage transmitters into compliance. We have considered carefully Mr. Gagnon's Application for Review. He has not submitted any compelling arguments why his station should be given preferential treatment over other amateur stations operated by licensees of the same license class. There is no basis for permitting his station to use greater power than other amateur stations. To do otherwise, would be unfair to the other amateur station licensees who must comply with the power requirement.

3. In view of the foregoing, and pursuant to Section 154(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), IT IS ORDERED that the denial by the Chief, Private Radio Bureau, of the request of Mr. Dale Gagnon for waiver of Section 97.313(b) of the Commission's Rules, IS AFFIRMED.

4. For further information concerning this Memorandum Opinion and Order, contact Maurice J. DePont, Private Radio Bureau, (202) 632-4964.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMCAST CABLEVISION OF
TALLAHASSEE, INC.

Petition for Appeal from a
Rate Order of the City of
Tallahassee, Florida

ORDER

Adopted: April 20, 1994; Released: April 22, 1994

By the Acting Chief, Cable Services Bureau:

1. The City of Tallahassee, Florida ("Tallahassee") has filed a motion to extend the time to May 9, 1994 for filing its response to the Petition for Appeal of Tallahassee's rate order filed by Comcast Cablevision of Tallahassee, Inc. ("Comcast").[1] Commission regulations permit interested parties to file an opposition to an appeal of a local franchising authority's rate decision within 15 days after the appeal is filed.[2] Comcast filed its appeal of the local rate order on April 8, 1994. Thus, absent other factors, Tallahassee would be required to file any opposition by April 25, 1994.[3]

2. Tallahassee contends, and we agree, that Comcast's Petition for Appeal presents numerous and complex issues requiring additional time for response. However, we believe that extending Tallahassee's response deadline until May 9, 1994, thereby almost doubling Tallahassee's opportunity for preparing a response, would unduly delay Commission resolution of the underlying appeal. Accordingly, we will extend Tallahassee's time period for filing its opposition until May 2, 1993. We believe that this approach strikes a reasonable balance between affording Tallahassee a sufficient opportunity to prepare its opposition filing and the facilitation of Commission review of the merits of Comcast's appeal.

3. Accordingly, IT IS ORDERED that the City of Tallahassee's Motion for Extension of Time is GRANTED IN PART, and DENIED IN PART.

4. IT IS FURTHER ORDERED that the time period in which the City of Tallahassee must file any opposition petition to the appeal of its local rate order concerning Comcast Cablevision of Tallahassee, Florida, IS EXTENDED until May 2, 1994. This action is taken by the Acting Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules.

5. IT IS FURTHER ORDERED that this Order is EFFECTIVE on April 22, 1994.

FEDERAL COMMUNICATIONS COMMISSION

Alexandra M. Wilson
Acting Chief, Cable Services Bureau

[1] Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), 47 U.S.C. § 543(b).

[2] 47 C.F.R. § 76.944(b).

[3] *See* 47 C.F.R. § 1.4 (computation of time period for filing motions and petitions before the Commission).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-34

In the Matter of

Implementation of
Commission's Equal
Employment Opportunity Rules

NOTICE OF INQUIRY

Adopted: April 20, 1994; Released: April 21, 1994

Comment Date: May 23, 1994
Reply Comment Date: June 7, 1994

By the Commission:

Commissioner Barrett issuing a separate statement.

I. INTRODUCTION

1. In this *Notice of Inquiry*, we seek comment on the effectiveness of the Commission's rules, procedures, policies, standards and guidelines in promoting equality of employment opportunity and promotion opportunity in the cable and broadcast industries; on questions and proposals regarding possible changes to the Commission's EEO rules, policies and enforcement thereof; and on how to further, to the greatest extent possible, the goals of the Commission. The overriding goal underlying our EEO rules is to promote program diversity. In addition, our EEO rules enhance access by minorities and women to increased employment opportunities, which are the foundation for increasing opportunities for minorities and women in all facets of the communications industry, including participation in ownership. Thus, the rules also promote the further development of the broader communications infrastructure.

2. Pursuant to Section 22(g) of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (hereinafter "1992 Cable Act" or "Cable Act of 1992"):

> Not later than 2 years after the date of enactment of this Act,[1] the Commission shall submit to the Congress a report pursuant to a proceeding to review and obtain public comment on the effect and operation of the amendments made by this section. In conducting such review, the Commission shall consider the effectiveness of its procedures, regulations, policies, standards, and guidelines in promoting equality of employment opportunity and promotion opportunity, and particularly the effectiveness of its procedures, regulations, policies, standards, and guidelines in promoting the congressional policy favoring increased employment opportunity for women and minorities in positions of management authority.

3. The Commission implemented the changes mandated in the 1992 Cable Act in *Implementation of Section 22 of the Cable Television Consumer Protection and Competition Act of 1992 Equal Employment Opportunities*, 8 FCC Rcd 5389 (1993) (hereinafter *"Cable Report and Order") (petitions for reconsideration pending)*. The 1992 Cable Act also provided that the Commission should not revise:

> (1) the regulations concerning equal employment opportunity as in effect on September 1, 1992 (47 C.F.R. Section 73.2080) as such regulations apply to television broadcast station licensees and permitees; or
>
> (2) the forms used by such licensees and permitees to report pertinent employment data to the Commission.

Section 22(f) of the 1992 Cable Act.

The 1992 Cable Act required the Commission to forward to Congress such legislative recommendations to improve equal employment opportunity in the broadcast and cable industries as it deems necessary. Section 22(g) of the 1992 Cable Act. We note that some of the proposals contained herein might require statutory change so as not to violate the above-cited restriction.

II. BACKGROUND

EEO Enforcement

4. *Broadcast.* Pursuant to Section 73.2080 of the Commission's Rules, 47 C.F.R. Section 73.2080, broadcast licensees must establish and maintain an equal employment opportunity program designed to provide equal employment opportunity for minorities and women in all aspects of their employment policies and practices.[2] As part of their renewal applications, broadcast stations with five or more full-time employees are required to file a "Broadcast Equal Employment Opportunity Program Report" (Form 396) which requests general information concerning the recruitment and hiring practices of the licensee during the renewal year, the 12-month period prior to the filing of the renewal application. The information requested includes: examples of recruitment sources contacted to attract minority and female applicants; the number of minority and female referrals received from these sources; and the number of overall and upper-level hires[3] and promotions occurring at a station. Licensees also are required to file a Broadcast Station Annual Employment Report (Form

[1] The 1992 Cable Act was enacted on October 5, 1992.

[2] The EEO compliance of television stations is reviewed once every five years at renewal time and the EEO compliance of radio stations is reviewed once every seven years at renewal time.

[3] Upper-level hires include hires for four of the nine job categories listed on Broadcast Annual Employment Reports: Officials and Managers; Professionals; Technicians and Sales Workers. We note that upper-level hires are the same as upper-four hires.

395-B) on a yearly basis.[4] These reports request information concerning a station's workforce profile for a two week payroll period, broken down by full or part-time status, job category, gender and race or national origin.

5. When reviewing a broadcaster's EEO compliance at renewal time, the Commission's primary focus is on the licensee's overall efforts to "establish, maintain, and carry out a positive continuing program of specific practices designed to ensure equal opportunity in every aspect of station employment policy and practices."[5] The efforts evaluation is a two-step process. The first step involves an evaluation of a station's efforts based on a full range of information available concerning its EEO record. The staff reviews the composition of the station's workforce as reported in its Annual Employment Reports filed during the license term;[6] the station's EEO program filed as part of the renewal application including the recruitment sources listed, the number of minority and female referrals received, the number of minorities and women hired during the renewal year and the licensee's analysis of the effectiveness of its EEO efforts; any final determinations of complaints filed with government agencies and/or courts established to enforce nondiscrimination laws; and any petitions to deny or informal objections filed. If the first step review indicates that the station's EEO efforts are satisfactory, the station is accepted as having fulfilled its EEO obligations. However, if the initial analysis indicates that a station's efforts may be less than satisfactory with regard to such areas as minority and/or female recruitment and hiring, it is subject to a second-step analysis.[7] If a broadcast station is found to be in compliance with the Commission's broadcast EEO Rule, renewal is granted. If, however, it is not in compliance, the Commission may impose a variety of remedies and sanctions, such as admonishment, reporting conditions, renewal for less than a full term and/or forfeiture. Alternatively, if the facts so warrant, the Commission will designate the renewal application for hearing to determine whether renewal of license should be granted or denied.[8]

6. Recently, the Commission issued an EEO *Policy Statement*, 9 FCC Rcd 929 (1994) (*petitions for reconsideration and requests for clarification pending*), which establishes non-binding guidelines for assessing forfeitures for violations of the Commission's broadcast EEO Rule. The *Policy Statement* indicates that the base forfeiture amount for violation of the broadcast EEO Rule is $12,500. It provides guidance on what situations generally may lead to such a forfeiture, describes upward and downward adjustment criteria and the circumstances warranting a short-term renewal as well as circumstances that may require designation for hearing.

7. In the 1992 Cable Act, Congress adopted provisions requiring that the Commission conduct midterm reviews of broadcast television station licensees. The legislative history of the 1992 Cable Act indicates that Congress intended that the midterm evaluation of a licensee's employment practices should be based on an analysis of workforce data using our present processing guidelines.[9] Therefore, we amended our rules to include the standard discussed in the Conference Report as the basis for examining employment practices.[10] The midterm review is conducted by evaluating the first two Annual Employment Reports that are filed after a television station's license has been renewed. A deficiency letter is sent to those licensees that fail to meet the processing guidelines. However, the issuance of a midterm deficiency letter to a licensee will not be viewed as a sanction against it. Further, a station's compliance at midterm with the processing guidelines will not be evidence of overall EEO compliance efforts at renewal. Nevertheless, "at renewal time, we will take cognizance of all pertinent license term EEO data, including data relied upon for midterm review."[11]

8. *Cable.* Pursuant to Sections 76.71 and 76.73 of the Commission's Rules, 47 C.F.R. Sections 76.71 and 76.73, cable operators must establish and maintain an equal employment opportunity program designed to provide equal employment for minorities and women in all aspects of their employment policies and practices. The staff monitors the EEO performance of cable operators at three different levels. First, the staff analyzes the EEO programs of cable systems and headquarters units with more than five full-time employees on an annual basis by reviewing their Cable Television Annual Employment Reports (Form 395-A).[12] The Form 395-A requires answers to nine questions about the cable operator's EEO efforts: the number, race or national origin, gender and job classification of

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[4] *See* 47 C.F.R. Section 73.3612.

[5] 47 C.F.R. Section 73.2080; *see Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987) *petition for reconsideration pending; see also* 4 FCC Rcd 1715 (1989) (hereinafter "*NAB Report and Order*") (request for clarification of the National Association of Broadcasters).

[6] This analysis involves a comparison of the composition of the station's employment profile, as reflected in its Annual Employment Reports, with the relevant labor force, and application of Commission processing guidelines, as follows: stations with five to ten full-time employees meet the guidelines if the proportion of minority and female representation on their overall staffs is at least 50% of that of the relevant labor force, and on their upper-level staffs at least 25% of that of the relevant labor force. Stations with 11 or more full-time employees meet the guidelines if the proportion of minority and female representation is at least 50% of that of the relevant labor force for both overall and upper-level job categories.

[7] This analysis usually includes a request for additional information. Our request will typically ask for each job filled during the requested period (usually the last three years of the license term): the title and job classifications (based on classifications set forth in Form 395-B) of the position; the date the position was filled; the number, gender, race or national origin and referral source of applicants and interviewees; whether the job was part-time or full-time; the gender and race or national origin of the successful candidate; the recruitment sources contacted; and the number, race and sex of referrals received from each recruitment source. In addition, we request a list of all full-time employees, showing job title, job classification, gender and race ranked from highest to lowest paid.

[8] *See Applications of The Lutheran Church/Missouri Synod For Renewal of Licenses of Stations KFUO/KFUO-FM Clayton, Missouri*, 9 FCC 914 (1994); *Applications of Dixie Broadcasting, Inc. For Renewal of Licenses of Stations WHOS(AM)/WDRM(FM) Decatur, Alabama*, 7 FCC Rcd 5638 (1992); *Application of WXBM, INC. For Renewal of License of Station WXBM-FM Milton, Florida*, 6 FCC Rcd 4782 (1991).

[9] *See* House Committee on Energy and Commerce, H.R. Rep. No. 102-862, 102d Cong., 2d Sess. (1992) reprinted at Cong. Rec. H8308, H8334 (daily ed. September 14, 1992) (hereinafter "Conference Report").

[10] *Cable Report and Order, supra.*

[11] *Id.* at 5392.

[12] *See* 47 C.F.R. Section 76.77.

each full-time and part-time employee on the system's workforce; and the number, race or national origin and gender of all employees promoted and hired (both overall and upper-level[13]) during the same 12-month period. Second, the staff reviews responses to Supplemental Investigation Sheets (SIS) which are sent to cable operators every five years.[14] The SIS requests additional specific information regarding recruitment efforts and job classifications. Finally, the Commission uses its authority to conduct on-site audits of cable facilities to verify EEO information reported by cable operators.

9. The Form 395-A, along with any additional information, is reviewed using a two-step process which involves statistical analysis of the cable system's workforce[15] and a review of the system's responses to questions regarding its EEO efforts. In addition, the Commission examines any EEO complaints that may have been filed against the cable system. If a system appears to be in compliance with the Commission's EEO Rules, it is granted certification[16] for that year. If the Commission finds that the system is not engaging in sufficient efforts, additional inquiries are made. If, based on the Form 395-A report, any additional available information and responses to any Commission inquiries, it is determined that the system is not in compliance, certification is denied. The Commission also may impose a variety of remedies and sanctions, including monetary forfeiture and suspension of the system's cable auxiliary relay service (CARS) license until the Commission determines that the cable operator's failure to comply with the Commission's EEO Rules has been corrected.[17] The Commission also could notify local franchising authorities of cable violations for their appropriate consideration in making franchise renewal decisions.[18]

10. In the 1992 Cable Act, Congress required that the Commission collect more specific employment data from cable entities, including specific information on the job titles of employees. In addition, the Act expanded the nine original cable job categories to 15.[19]

11. *Multichannel Video Programming Distributors.* The 1992 Cable Act also expanded the scope of the cable EEO provisions to include multichannel video programming distributors (MVPD), which the 1992 Cable Act defines as "a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming."[20] We anticipate that MVPDs' EEO programs will be analyzed in the same manner as cable systems' EEO programs.[21]

III. DISCUSSION

12. As noted *supra*, in this *Notice of Inquiry*, we seek comment on the effect and operation of the equal employment opportunity amendments made by the 1992 Cable Act and on the general effectiveness of the Commission's rules, procedures, policies, standards and guidelines in promoting equality of employment opportunity in the cable, broadcast and other industries in order to assist the Commission in complying with Section 22(g) of the 1992 Cable Act. We also invite comment on the proposals discussed herein.

Effectiveness of EEO Enforcement

13. *Broadcast.* Prior to 1987, EEO enforcement focused on whether licensees met our processing guidelines regarding women and minorities overall and in the upper-four job categories as reflected in the last Annual Employment Report filed before the license term expired. Licensees meeting the processing guidelines were presumed to be in compliance with the Commission's EEO requirements and, absent Petitions to Deny, their renewal applications were granted unconditionally without further review. Further, the Commission rarely scrutinized a licensee's hires outside the context of the most recent Annual Employment Report. However, after the Commission adopted an efforts-based approach in 1987, the Commission departed from its reliance on the processing guidelines as the principal means of assessing compliance. Since 1987, all renewal applications have received a more complete review, irrespective of whether stations meet or fail to meet our processing guidelines.

14. At the present time, we license more than 13,000 radio and television stations. Of that number, approximately two-thirds have five or more full-time employees and therefore are required to file their EEO programs with their renewal applications. Approximately 80% of these stations' renewals are granted after review of their Annual Employment Reports, renewal applications, complaints and any other pleadings filed concerning the stations' renewals. We send inquiry letters to the remaining 20%. As a result of our review of these stations, we sanction approximately one-fifth of the remaining 20%. Thus, 4% of all stations subject to EEO review receive reporting conditions and/or

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[13] *See* n.3, *supra*.

[14] 47 C.F.R. Section 76.77.

[15] Generally, a cable system's work force is analyzed using the same processing guidelines as described in n.6, *supra*. However, the composition of a headquarters unit's upper-level staff is compared to national, not local, labor force statistics. *See Amendment of Part 76 of the Commission's Rules to Implement the Equal Employment Opportunity Provisions of the Cable Communications Policy Act of 1984*, 102 FCC 2d 562 (1985).

[16] A cable system receives a Certificate of Compliance if it is found to be in compliance with the Commission's EEO Rules. 47 C.F.R. Section 76.77(b).

[17] *See* Section 634(f)(2) of the Communications Act of 1934, as amended, 47 U.S.C. Section 554(f)(2).

[18] 47 U.S.C. Section 554(f)(4).

[19] The nine original job categories include Officials and Managers, Professionals, Technicians, Sales Workers, Office and Clerical, Craft Workers (Skilled), Operatives (Semi-skilled), Laborers, and Service Workers. The six job categories added by the 1992 Cable Act include Corporate Officers, General Manager, Chief Technician, Comptroller, General Sales Manager and Production Manager.

[20] 47 U.S.C. Section 522(12).

[21] However, we note that our analysis of the 1994 reporting year will not be exactly the same for cable systems and MVPD's because "in order to facilitate the transitional filing period for these entities, we will waive the requirement for the submission by these entities of 12-month hiring and promotion data as requested in Section V (subsections B and C) and Section VII of the 1994 Annual Employment Report." *Cable Report and Order* at 5399 n.155.

sanctions. The majority of stations in this 4% category receive reporting conditions and/or forfeiture sanctions. Ultimately, approximately 96% of the renewals reviewed are granted without reporting conditions and/or sanctions.

15. From 1988 to 1992,[22] there has been some improvement in the EEO profile of the broadcasting industry generally. In 1988, 16.8% of all positions and 10.9% of Officials and Managers positions in the broadcast industry were filled by minorities.[23] In 1992, 18.2% of all positions and 12.5% of Officials and Managers positions were filled by minorities. In 1988, 38.3% of all positions and 31.2% of Officials and Managers positions were filled by females. In 1992, 39.5% of all positions and 33.8% of Officials and Managers positions were filled by females.[24]

16. The results of the first midterm review of television stations, located in Virginia, West Virginia, Maryland and the District of Columbia, indicate that the majority of these stations meet or exceed our processing guidelines. Pursuant to this new requirement, we have reviewed approximately 60 stations and found that nine stations require deficiency letters. Of these nine stations, three failed to meet our requirements for both years reviewed, three failed for only the first year, and three failed for only the second year.

17. *Cable.* There are approximately 2,300 cable employment units.[25] Of those units, approximately 95% receive EEO certifications based upon our review of their Annual Employment Reports and any other available information. Further, all units receive Supplemental Investigations Sheets (SIS) once every five years. Each year based upon our review of their Annual Employment Reports, SIS responses and any other available information, approximately 90% of these units receive certifications. Typically, the staff schedules audits of 25 cable companies a year and decertifies half of the units audited. Since the 1984 Act, the Commission has sanctioned two cable operators based upon information obtained during on-site reviews.[26]

18. As with broadcast, the results of Commission EEO enforcement in the cable industry have shown some improvement during the period from 1988 to 1992. In 1988, 21% of total positions and 10.2% of Officials and Managers positions in the cable industry were filled by minorities.[27] In 1992, 25% of all positions and 12.5% of Officials and Managers positions in the cable industry were filled by minorities. In 1988, 40.7% of all positions and 34.5% of Officials and Managers positions in the cable industry were filled by females. In 1992, 41.7% of all positions and 36.3% of Officials and Managers positions in the cable industry were filled by females.[28]

19. Currently, there is little information available on the effects of the 1992 Cable Act on the cable industry. The revised Cable Television Annual Employment Report and the new MVPD Annual Employment Report (Form 395-M) were mailed to cable operators and all other entities covered by the new Act in early April 1994. They are not due until May 31, 1994, and, as a result, the majority of the forms have neither been received nor evaluated. Thus, during the course of this proceeding, additional information may become available as the new rules are implemented.

Proposals For Changes in EEO Rules and Policies

Broadcast

20. We seek comment on the following questions and proposals regarding possible changes to the Commission's broadcast EEO rules, policies and enforcement thereof. We also invite any additional suggestions or proposals concerning the subject matter.

21. *EEO Rule and Policies.* First, we invite comment on ways the Commission can better enable broadcasters to meet their EEO obligations. In pleadings filed with the Commission, broadcasters sometimes state that they are located in small markets and that they have unique difficulties attracting and retaining minority employees because of their location. To what extent can the Commission's EEO policies reflect these concerns? In this regard, how should "small market broadcasters" be defined? What process should be implemented to identify such broadcasters?

22. The Commission's primary EEO enforcement policies focus on minorities and women employed on a full-time basis. Should the requirement for efforts documentation of part-time hires be eliminated for all broadcasters? Alternatively, what level of consideration should be given for part-time hires consistent with our primary EEO policy focus which is on full-time hires and employment? How many minimum hours would an employee have to work for a broadcaster to receive appropriate consideration?

23. We note that cable operators and MVPDs are already required to "encourage minority and female entrepreneurs to conduct business with all parts of [their] operation." 47 U.S.C. Section 554(d)(2)(E). Should broadcasters also be required to encourage minority and female entepreneurs to conduct business with all parts of their operation?

24. Is the Commission's broadcast EEO enforcement adequate regarding the promotion and retention of minority and female employees and, if not, to what extent should changes be made?

25. We now give credit to broadcasters for using minority/female sources and/or obtaining minority/female referrals through individual and/or joint efforts with other licensees. What can the Commission do to encourage joint recruitment efforts by broadcasters?

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[22] Industry-wide data for 1993 has not yet been compiled.

[23] 1992 Broadcast and Cable Employment Report (July 6, 1993) (hereinafter "1992 Employment Report").

[24] *Id.*

[25] Pursuant to Section 76.5 of the Commission's Rules, 47 C.F.R. Section 76.5, a cable system is "[a] facility consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community..." A cable employment unit is a cable system or an amalgamation of several cable systems "that are under common ownership or control and are interrelated in their local management, operation, and utilization of employees..." 47 C.F.R. Section 76.71(b).

[26] *Adelphia Communications Corporation's Unit 305, Palm Beach County, Florida*, 9 FCC Rcd 908 (1994); *Prime Cable*, 4 FCC Rcd 1696 (1989).

[27] 1992 Employment Report, *supra.*

[28] *Id.*

26. Finally, is there a way to decrease any administrative burdens placed on broadcasters by the Commission without decreasing the effectiveness of our broadcast EEO enforcement? What are the costs and benefits of the suggestions mentioned above? Are there any other proposals or suggestions that should be considered that would make the Commission's EEO policies more effective?

27. *Inquiry Procedures.* We seek comment on proposed changes to the Commission's inquiry letters. Presently, standard inquiry letters request recruitment and hiring information[29] for the last three years of the license term. Should such letters be revised to request information for the entire license term or, in the alternative, for some other period of time? Should the Commission supplement its renewal inquiry procedures by conducting on-site audits in certain cases? If so, in what cases should broadcast stations be subject to audits?

28. *Renewal Applications.* We seek comment on the following proposed changes to the Form 396.[30] At the present time, among other things, Form 396 asks for examples of recruitment sources contacted during the renewal year. The Form 396 also asks for the number of minority and female referrals received from recruitment sources, and the number of overall as well as upper-level hires occurring during the renewal year. The form does not request that broadcasters distinguish between full-time and part-time hires in their responses. Should the renewal application be revised to either request information only for full-time hires or to request that the information be divided by full-time and part-time hires? Should the Commission monitor efforts by broadcasters to promote part-time employees to full-time positions? Should the renewal application be revised to request more detailed recruitment and hiring information, such as for every vacancy filled during the renewal year: the title and job classification of the position: the date the position was filled: the number, referral source, gender and race or national origin of applicants and interviewees; the full-time and part-time status of the position; the gender and race or national origin of the successful candidate; the recruitment sources contacted; and the number, race or national origin and sex of referrals received from each recruitment source?[31]

29. *Annual Employment Reports.* We invite comment on the following proposed change to the filing process for Broadcast Station Annual Employment Reports. Should we require that employment information be collected for the same 15 job categories as is now required for cable operators and MVPDs pursuant to the 1992 Cable Act? What are the costs and benefits of the above-cited revisions?

Cable

30. *Annual Employment Report.* We seek comment on the following proposed changes to and questions regarding the Commission's cable EEO rules, policies and enforcement thereof. Pursuant to the 1992 Cable Act, the Commission modified its Form 395-A to require cable operators to provide the gender, race and national origin of each employee falling into one of the nine original and six new job categories. We seek suggestions on any additional information which should be collected.

31. We also seek comment on the job title information sought in Form 395-A. Pursuant to the 1992 Cable Act,the Commission amended its Form 395-A to require cable operators to provide the job title for each employee listed on the employee profile section of the Form 395-A. Congress' intent in requiring the collection of job title data was to afford the Commission an added means of ensuring that employees are categorized in an accurate and uniform manner. We note that, in verifying the accuracy of job categorizations, the Commission relies on the description of the type and level of responsibility of the position and not the position's title. Indeed, we have found that some cable systems use the position's title in order to present a better, yet illusory, picture of their EEO programs. Thus, we seek comment as to how the job title requirement can be used in a more meaningful manner.

32. *Cable EEO Rules and Policies.* Is the Commission's cable EEO enforcement adequate regarding the promotion and retention of minority and female employees and, if not, to what extent should changes be made?

33. Presently, we select audit locations by picking a certain region of the country based on such factors as the concentration of minorities in the available labor force and the number of cable employment units in the area. We then review Cable Television Annual Employment Reports of units in that area to determine units that fall below the processing guidelines and/or have employment discrepancies.[32] Is there a more efficient and effective selection method? If so, describe it in detail.

34. In addition, we seek comment on whether the Commission should require cable operators to maintain certain types of records about their recruitment efforts for a specified period of time. While we expect broadcasters to keep records for an entire license term, cable operators have no such specific limits. Appropriate requirements for cable operators may help to ensure that cable operators are able to provide sufficient documentation of their EEO efforts upon request. It would also offer operators some guidance as to the appropriate retention periods for such records.

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[29] *See* n.7, *supra.*

[30] In Section 22(f) of the 1992 Cable Act, Congress stated that the Commission shall not revise "the forms used by [television] licensees and permitees to report pertinent employment data to the Commission." We propose to request that an exception to this prohibition be made and that the Commission be allowed to change the forms in the ways and for the reasons developed as a result of this proceeding.

[31] As the Commission indicated in *NAB Report and Order, supra,* and subsequent cases, a broadcaster is expected to retain this data, especially in light of the requirement that it engage in ongoing self-assessment. *Id.* at 1716. *See also Applications of Double L Broadcasting of Lansing Limited Partnership for Renewal of Licenses for Stations WJIM/WJIM-FM, Lansing, Michigan,* 7 FCC Rcd 6435 (1992); *Applications for Renewal of Licenses of Certain Broadcast Stations Serving Melbourne, Florida and Other Communities in the Florida Area,* 5 FCC Rcd 6738 (1990); *Application of Arkansas Television Commission for Renewal of License of Station KETS(TV), et al. Little Rock Arkansas,* 5 FCC Rcd 2745 (1990).

[32] An example of a such a discrepancy is when a unit reports employing five white male technicians in one Annual Employment Report, then reports employing ten white male technicians in its next report without listing any white male upper-level hires or promotions.

35. We seek comment on the remedies and sanctions available to redress violations of the cable EEO rules. Specifically, the Commission has a number of remedies and sanctions available including an admonishment, reporting conditions and forfeitures. The Commission also may suspend the cable antenna relay service license until the Commission determines that the cable operator's failure to comply with the cable EEO rules has been corrected. We seek comment on whether these remedies and sanctions are adequate and, if not, what other remedies and sanctions Congress might provide in order to enforce the cable EEO rules, particularly with respect to furthering the congressional goal of increased opportunities for minorities and women in managerial positions.

36. We seek comment on ways in which the Commission can better enable cable operators and MVPDs to meet their EEO goals. As noted above, the Commission made a number of changes to the cable EEO rules. More importantly, the 1992 Cable Act expanded the scope of these rules to include entities that had not been subject to EEO (or, in some cases, to Commission review) previously. Specifically, we seek suggestions as to how we might better inform cable operators, MVPDs and the public about the EEO requirements.

37. We now give credit to cable operators for using minority/female sources and/or obtaining minority/female referrals through individual and/or joint efforts with other cable operators. What can the Commission do to encourage joint recruitment efforts by cable operators?

38. Finally, is there a way to decrease any administrative burdens placed on the cable industry by the Commission without decreasing the effectiveness of the Commission's cable EEO enforcement? We seek comment on any aspect of the Commission's cable EEO rules including their implementation, costs and benefits.

General

39. There are a significant number of emerging technologies in the field of communications. There is also a convergence of existing communication technologies. Should our EEO policies be expanded with respect to entities other than broadcasters, cable operators and MVPDs? For example, should the EEO policies be expanded for common carrier technologies, particularly those that provide services that compete with broadcast and cable services (other than MVPDs already covered by the 1992 Cable Act)?

V. DUE DATES

40. Interested parties may file comments on or before May 23, 1994, and reply comments on or before June 7, 1994. An original and five copies of all comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W., Washington D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. Finally, we will treat this as a non-restricted proceeding subject to Section 1.1206(b)(2) of the Commission's Rules, 47 C.F.R. Section 1.1206(b)(2).

41. For additional information on this proceeding, contact Hope Cooper, Attorney/Advisor, EEO Branch, (202) 632-7069.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

SEPARATE STATEMENT
OF
COMMISSIONER ANDREW C. BARRETT

Title: In the Matter of Implementation of Commission's Equal Employment Opportunity Rule (NOI)

Pursuant to today's action, the Commission has released a Notice of Inquiry that seeks comment on the effectiveness of the Commission's rules, procedures, policies and guidelines in promoting the equality of employment and promotion opportunities in the cable and broadcast industries.

Congress intended that the Commission adopt policies which foster an increase in employment opportunities for women and minorities in positions of management authority.[1] In response, the Commission has developed policies, standards and guidelines that are consistent with Congress' mandate. It is imperative that this NOI, solicit comments on the effectiveness of the Commission's EEO policies, and what actions could be taken to enhance our EEO guidelines, in accordance with a congressional directive, in order to improve the effectiveness of our rules on employment profiles.

[1]Section 22(g) of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, 106 Stat. 1460 (1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of
Nationwide Communications, Inc.
Licensee, Station WBAY-TV
Green Bay, Wisconsin

For a Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: April 22, 1994; Released: May 9, 1994

By the Chief, Mass Media Bureau:

1. The Commission by the Chief, Mass Media Bureau, acting pursuant to authority delegated by Section 0.283 of the Commission's Rules, has under consideration (1) a Notice of Apparent Liability, released January 6, 1994, 9 FCC Rcd 175 (1994), assessing a forfeiture of $5,000 against Nationwide Communications, Inc., licensee of Station WBAY-TV, Green Bay, Wisconsin, for violation of Section 73.1216 of the Commission's Rules, and (2) a response filed January 15, 1994, by Nationwide.

2. Section 73.1216 in pertinent part requires that licensees fully and accurately disclose the material terms of any contest that they broadcast or advertise, and that they conduct the contest substantially as announced or advertised. Our Notice of Apparent Liability found that Station WBAY-TV, in connection with a contest to guess the total snow accumulation in Green Bay, Wisconsin, between November 15 and December 31, 1992, had broken a tie on the basis of postmark date rather than on the basis of a drawing, as advertised in the printed contest rules and in station announcements.

3. Nationwide does not dispute this finding, arguing instead that the $5,000 base forfeiture amount should have been adjusted downward under criteria set forth in our *Policy Statement, Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993), *pet. for review pending sub nom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992). It maintains in this regard that its violation was a minor one, in that some of the announcements promoting the contest described the planned tie-breaking mechanism accurately. Further, Nationwide urges that it otherwise acted in good faith, awarding the contest prize as announced and receiving no benefit from its error. Nationwide also cites its history of compliance with Commission Rules as grounds for reduction of the forfeiture amount.

4. We cannot dismiss Nationwide's violation of our Rules as minor, however. The manner in which ties would be broken was clearly a material term of the "Snowfall Watch" contest; the postmark date mechanism placed a premium on time of filing that would not have been present had the announced drawing mechanism been used. At the same time, we agree that Nationwide's history of compliance with Commission Rules warrants a reduction of the forfeiture amount under the criteria of the *Policy Statement*. Hence we will reduce the forfeiture to $3,500 on this basis.

5. Accordingly, the request of Nationwide Communications, Inc., IS GRANTED to the extent indicated herein, and IS DENIED in all other respects. IT IS ORDERED, that Nationwide Communications, Inc., licensee of Station WBAY-TV, Green Bay, Wisconsin, FORFEIT to the United States three thousand five hundred dollars ($3,500) for its violation of Section 73.1216 of the Commission's Rules. Payment of the forfeiture may be made by following the instructions on the enclosed form. In regard to this forfeiture proceeding, the licensee may take any of the steps set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Yukon Princess, Inc. NAL Acct. No. 315HF0022
Licensee of WAS3635
on the Vessel Yukon Princess
Seattle, Washington

ORDER

Adopted: April 28, 1994; Released: May 10, 1994

By the Field Operations Bureau:

I. INTRODUCTION

1. The Enforcement Division, Field Operations Bureau (FOB), is cancelling the July 19, 1993, Notice of Apparent Liability (NAL), 8 FCC Rcd 5158 (1993), issued pursuant to Section 364 of the Communications Act of 1934, as amended (the Act), 47 U.S.C. § 364, to Yukon Princess, Inc., licensee of station WAS3635, on the commercial fishing vessel Yukon Princess. The Yukon Princess was cited for violating Sections 361 and 362 of the Communications Act, 47 U.S.C. §§ 359, 360, by sailing on the open sea without an annual inspection.

2. For the reasons explained below, we are cancelling the NAL.

II. DISCUSSION AND CONCLUSION

3. On July 19, 1993, the Enforcement Division, Field Operations Bureau, issued a Notice of Apparent Liability to Yukon Princess, Inc. in the amount of $20,000, and informed the company that it had 30 days to respond with information that would warrant mitigation or remission of the forfeiture.

4. Yukon Princess, Inc., through counsel, has responded advising the Commission that it is unable to pay any forfeiture because of legal proceedings being taken against the vessel and the company.

5. In an action to foreclose the preferred ship mortgage, on December 22, 1993, the Court issued an Order granting summary judgment motion and directing that an order to sell the vessel be entered within fifteen days unless a party can show cause why it should not be entered. The parties proposed that the Court place the vessel under receivership to allow it to fish during the fishing season. The F/V Yukon Princess has since been placed under receivership, and is under the Admiralty jurisdiction of the U.S. District Court for the Western District of Washington.

6. We agree with Petitioner that it has demonstrated that it is unable to pay the proposed forfeiture or any reduced forfeiture amount. Under the receivership, gross revenues are to be distributed to lienholders and preferred creditors. None of the funds will go to Petitioner, Yukon Princess, Inc. We are, therefore, cancelling the forfeiture.

III. ORDERING CLAUSES

7. Accordingly, IT IS ORDERED, pursuant to Section 504(b) of the Act, 47 U.S.C. § 504(b), and Section 0.314(d)(1) of the Commission's Rules, 47 C.F.R. § 0.314(d)(1), that the Notice of Apparent Liability issued to Yukon Princess, Inc., on July 19, 1993, is CANCELLED.

8. IT IS FURTHER ORDERED that a copy of this Order be sent by certified mail--return receipt requested, to Yukon Princess, Inc., and its counsel.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PC Fixx, Inc. dba PCFIXX Clearance Center
Seattle, Washington

NAL/Acct. No. 315ST0014

ORDER

Adopted: April 28, 1994; Released: May 10, 1994

By the Chief, Field Operations Bureau:

I. INTRODUCTION

1. PC Fixx, Inc. dba PCFIXX Clearance Center ("PC Fixx") filed a Petition for Reconsideration, requesting reconsideration of the monetary forfeiture of $16,000 issued for violation of Section 503(b) of the Communications Act of 1934, as amended (the Act), and Section 302(b) of the Commission's Rules. For the reasons noted below, the Bureau affirms the monetary forfeiture.

II. BACKGROUND

2. On March 5, 1993 , the Seattle Office issued a Notice of Apparent Liability (NAL) to PC Fixx, Inc. The penalty was imposed for sale of unauthorized devices. Based on the response from PC Fixx, Inc., the Seattle Office issued a Notice of Forfeiture (NOF) for $16,000 on June 18, 1993. PC Fixx, Inc. now appeals. The petitioner contends that the alleged violations were insubstantial and unintentional, they have no prior violations, they cannot afford to pay the fine, they were denied the opportunity to verify three out of the four alleged violations, and that in past FCC decisions, similar violations warranted smaller fines.

III. DISCUSSION AND CONCLUSION

3. The arguments raised in Section 2 of the Petition for Reconsideration have been thoroughly considered and are incorporated herein by reference. Upon review of these arguments raised in the petition, as well as review of the NAL and NOF, we find that the petitioner fails to present any new evidence that was not previously addressed. The petitioner's argument that it is unable to respond completely to the NOF contradicts its prior submission in response to the NAL. The petitioner's argument that it cannot verify three of the four violations conflicts with its earlier statement that at least two devices were certified and provided grants of certification to corroborate this argument. The FCC generally issues forfeitures for uncertified devices at $7000 as was done in this case. As for reduction for minor violations, this type of violation is not considered minor. We note that the petitioner claims that it cannot pay the forfeiture and submitted financial information in support of this contention. However, the financial information does not support this contention, so we affirm the forfeiture amount accordingly.

IV. ORDERING CLAUSES

4. IT IS ORDERED THAT, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Section 1.106 of the Rules, 47 C.F.R. § 1.106, that the petition for reconsideration is DENIED.

5. IT IS FURTHER ORDERED that PC Fixx, Inc. must pay the forfeiture amount of sixteen thousand dollars ($16,000) within thirty (30) days of receipt of this Order. Payment may be made by check or money order payable to the Federal Communications Commission.[1] Please place NAL/Acct. No. 315ST0014 on the remittance and mail it to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

6. IT IS FURTHER ORDERED that a copy of this Order shall be sent to PC Fixx, Inc. and counsel.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

[1] Requests for installment plans should be mailed to: Chief, Billings and Collections, Mail Stop 1110A2, 1919 M Street, N.W., Washington, D.C. 20554. Payment of the forfeiture in installments may be considered as a separate matter in accordance with Section 1.1914 of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Robert J. Hartman NAL/Acct. No. 315AL0002
Cessapolis, MI

ORDER

Adopted: April 29, 1994; Released: May 10, 1994

By the Field Operations Bureau

I. INTRODUCTION

1. The Bureau has before it a request for reconsideration from Mr. Robert J. Hartman dated June 1, 1993. Mr. Hartman objects to a $4,000 monetary forfeiture penalty imposed on him for violating Section 301 of the Communications Act of 1934. Mr. Hartman's request is accepted as a Petition for Reconsideration under Section 1.106 of the Federal Communications Commission's (FCC) rules. 47 C.F.R. Section 1.106.

2. As explained below, the $4,000 monetary forfeiture penalty is reduced to $3,000.

II. BACKGROUND

3. Our records show that FCC engineers monitored Mr. Hartman's radio transmissions on 26.815 MHz on January 21, 1993, from 11:37 to 11:43 PM. It was determined by close-in direction finding techniques that the transmissions were coming from Mr. Hartman's residence. On January 22, 1993, the FCC engineers inspected Mr. Hartman's radio station in his residence. They observed a Galaxy base radio AM/FM/SSB transmitter capable of transmitting on 26.065 to 28.305 MHz. The transmitter was capable of operating on Citizens Band (CB) frequencies as well as on frequencies below and above CB frequencies.

4. On February 11, 1993, the FCC's office in Allegan, Michigan, issued Mr. Hartman a Notice of Apparent Liability for a $10,000 monetary forfeiture penalty for willfully violating Section 301 of the Communications Act. The Notice stated that the base forfeiture amount for this type of violation was $8,000, and that the penalty was being increased to $10,000 because Mr. Hartman had previously violated Section 301.

5. Mr. Hartman responded to the FCC's Notice of Apparent Liability on March 1, 1993. The FCC's Allegan Office provided clarifying information in a letter dated March 15, 1993, and Mr. Hartman replied on March 22, 1993. On April 6, 1993, the FCC's Allegan Office issued a Forfeiture Order for a $4,000 monetary forfeiture penalty. This was reduced from $10,000 proposed in The Notice of Apparent Liability based on Mr. Hartman's inability to pay the proposed amount. The FCC is authorized to impose monetary forfeiture penalties for violations of the Communications Act by Section 503(b) of the Act. 47 U.S.C. Section 503(b).

III. DISCUSSION AND CONCLUSION

6. In his letters, Mr. Hartman states several reasons why he should not be subject to a monetary forfeiture penalty. First, he states correctly that CB radio operators are not required to be individually licensed by the FCC. However, Mr. Hartman was not operating on a CB frequency, and, therefore an FCC license was required.

7. Mr. Hartman further explains that "I was unaware of this as a violation, due to the fact that the radio was produced with this frequency built in at the factory and listed in the owners manual as an available frequency. ... I have not used any frequency out of the 40 channel [CB] band since being informed by your agents of their unlawful use." Mr. Hartman has previously violated the same Commission rules and was notified by the Commission of this violation. Because of this prior violation, Mr. Hartman was obviously aware of the requirements of Section 301 of the Communications Act and should have taken care to avoid future violations. The fact that the same type of violation previously occurred reduces the probability that Mr. Hartman "was unaware of this as a violation."

8. A person's failure, moreover, to acquaint himself with the legal requirements relating to the operation of a radio transmitter does not excuse a violation. *Triad Broadcasting Company, Inc.*, 96 FCC 2d 1235, 1242 (1984). Furthermore, Mr. Hartman was charged with a willful violation of Section 301. Section 312(f)(1) of the Communications Act defines a willful violation as "the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act ... ." 47 U.S.C. Section 312(f)(1). Willfulness exists if there is a voluntary act or omission in that a person knew that he was doing the act in question such as using a radio transmitter, as opposed to being accidental (for example, brushing against a power switch turning on a radio transmitter). Furthermore, to establish a willful violation, it is not necessary to show that a person knew he was acting wrongfully. In addition, a key policy factor involved in imposing monetary penalties is whether a person demonstrated lack of concern or indifference regarding compliance with the Communications Act and the FCC's rules. *Southern California Broadcasting.*

9. Mr. Hartman also argues that the typical penalty for a violation of Section 301 is $250 to $1,000. While Mr. Hartman is correct that several years ago the typical penalty for a 301 violation was $1,000, the FCC issued a Policy Statement in 1991 that recommended $8,000 as the base value of a monetary forfeiture penalty issued to individuals for operating a radio transmitter without a license. *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. denied*, 7 FCC Rcd 5339 (1992), *petition for review pending sub nom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992). The Commission recently affirmed $8,000 as the base value for this type of violation. *Policy Statement*, 8 FCC Rcd 6215 (1993).

10. Finally, Mr. Hartman claims that he is unable to pay the penalty because he is unemployed with a disability. In consideration of this, the FCC's Allegan Office reduced the penalty to $4,000. The income tax returns that Mr. Hartman provided, indicate that Mr. Hartman can afford to pay a forfeiture, albeit of a lesser amount. Thus, we will adjust the forfeiture amount accordingly. We reiterate that the forfeiture amount is reduced only for financial reasons.

11. The unlicensed operation of a radio transmitter is one of the most serious violations under the Communications Act. *Mebane Home Telephone Company*, 51 RR 2d

926, 927 (Common Carrier Bureau) (1982). If Mr. Hartman continues to violate Section 301 of the Communications Act, the FCC will utilize the penalties necessary to terminate the unlawful conduct. Section 503(b)(2)(c) of the Communications Act authorizes the FCC to impose monetary forfeiture penalties on individuals of "$10,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $75,000." 47 U.S.C. Section 503(b)(2)(c). Section 510 of the Communications Act authorizes the FCC to seize radio equipment that is used in violation of the Act. 47 U.S.C. Section 510. And Section 501 of the Act provides criminal penalties of up to one year in jail and additional fines for the first conviction and two years in jail for subsequent convictions. 47 U.S.C. Section 501.

IV. ORDERING CLAUSES

12. IT IS ORDERED that, pursuant to Section 503(b) of the Communications Act of 1934 and Section 1.106 of the FCC's rules the relief sought in the Petition for Reconsideration filed by Mr. Robert J. Hartman is GRANTED in part and DENIED in part. 47 U.S.C. Section 503(b), 47 C.F.R. Section 1.106.

13. IT IS FURTHER ORDERED that, pursuant to Section 503(b) of the Communications Act and Section 1.106 of the FCC's rules, Mr. Robert J. Hartman FORFEIT to the United States a monetary forfeiture penalty of $3,000. This penalty is imposed for the willful violation of Section 301 of the Communications Act.

14. IT IS FURTHER ORDERED that the monetary forfeiture penalty may be paid by check or money order payable to the Federal Communications Commission. Please place the forfeiture account number 315 AL 0002 on the remittance and mail it to:

Federal Communications Commission

Post Office Box 734482

Chicago, Illinois 60673-7482

If the monetary forfeiture penalty is not paid within 30 days, the forfeiture case may be referred to the U.S. Attorney for collection through a civil suit. 47 U.S.C. Section 504(a).

15. IT IS FURTHER ORDERED that a copy of this Order shall be sent certified mail, return receipt requested, to Robert Joseph Hartman.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Animation Technologies Inc.
Taipei, Taiwan, R.O.C.

NAL/Acct. No. 315LA0013

ORDER

Adopted: April 29, 1994; Released: May 10, 1994

By the Chief, Field Operations Bureau:

I. INTRODUCTION

1. Animation Technologies Inc. filed a Petition for Reconsideration, requesting reconsideration of the monetary forfeiture of $7,000 issued pursuant to Section 503(b) of the Communications Act of 1934, as amended, (the Act), 47 U.S.C. § 503(b), for violation of Section 302 of the Act, 47 U.S.C. §302, and Section 2.803 of the Commission's Rules, 47 C.F.R. § 2.803. For the reasons noted below, the Bureau reduces the monetary forfeiture to $5,600.

II. BACKGROUND

2. On December 7, 1992 , the Los Angeles Field Office issued a Notice of Apparent Liability (NAL) to Animation Technologies Inc. The penalty was imposed for exhibiting an uncertified personal computing device. Based on the response from Animation Technologies Inc., the Los Angeles Field Office issued a Notice of Forfeiture (NOF) for $5,600 on January 11, 1993. Animation Technologies Inc. now appeals. The petitioner contends a misunderstanding and lack of knowledge of FCC rules, and a history of overall compliance.

III. DISCUSSION AND CONCLUSION

3. The arguments raised at 2-3 of the Petition for Reconsideration have been thoroughly considered and are incorporated herein by reference. Upon review of these arguments raised in the petition as well as review of the NAL and NOF, we find that the petitioner fails to present any new arguments or evidence that was not previously addressed. However, in light of petitioner's past history of compliance with the Rules, we will reduce the amount of the forfeiture to $5,600.

IV. ORDERING CLAUSES

4. IT IS ORDERED THAT, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Section 1.106 of the Rules, 47 C.F.R. § 1.106, the petition for reconsideration is DENIED.

5. IT IS FURTHER ORDERED that, pursuant to Section 1.80 of the rules, 47 C.F.R. § 1.80, Animation Technologies Inc. must pay the forfeiture amount of five thousand six hundred dollars ($5,600) within thirty (30) days of receipt of this Order. Payment may be made by check or money order payable to the Federal Communications Commission.[1] Please place NAL/Acct. No. 315LA0013 on the remittance and mail it to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

6. IT IS FURTHER ORDERED that a copy of this Order shall be sent to Animation Technologies Inc.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

[1] Requests for installment plans should be mailed to: Chief, Billings and Collections, Mail Stop 1110A2, 1919 M Street, N.W., Washington, D.C. 20554. Payment of the forfeiture in installments may be considered as a separate matter in accordance with Section 1.1914 of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

W.P. Clark — NAL/Acct. No. 315ST0009
Puyallup, Washington

ORDER

Adopted: April 29, 1994; Released: May 10, 1994

By the Chief, Field Operations Bureau:

I. INTRODUCTION

1. W.P. Clark filed a Petition for Reconsideration, requesting reconsideration of the monetary forfeiture of $1,600 issued pursuant to Section 503(b), 47 U.S.C. § 503(b), for violation of Section 301 of the Communications Act, 47 U.S.C. §301, as amended (the Act). For the reasons noted below, the Bureau affirms the monetary forfeiture.

II. BACKGROUND

2. On February 2, 1993, the Seattle, WA Field Office issued a Notice of Apparent Liability (NAL) to W.P. Clark. The penalty was imposed for operating an unlicensed station. Based on the response from Mr. Clark, the Seattle Field Office issued a Notice of Forfeiture (NOF) for $1,600 on February 24, 1993. Mr. Clark now appeals. The petitioner requested mitigation of the forfeiture amount based on his history of compliance and because of his financial condition. Counsel for Petitioner also argues that the Petitioner did not commit a willful violation; that Petitioner is not a licensee and therefore the FCC erred by not issuing a citation; and that there is no evidence that Petitioner operated a radio.

III. DISCUSSION AND CONCLUSION

3. The arguments raised at paragraphs 3 and 4 of the Petition for Reconsideration and Counsel's supplement have been thoroughly considered and are incorporated herein by reference. Upon review of these arguments raised in the petition, as well as review of the NAL and NOF, we find that the petitioner fails to present any new arguments or evidence that was not previously addressed.[1]

Although the petitioner claims inability to pay the forfeiture, no documentation, such as tax returns or financial statements that were requested in the Notice of Apparent Liability, were submitted to support this claim. Accordingly, the forfeiture amount is affirmed.

IV. ORDERING CLAUSES

4. IT IS ORDERED THAT, pursuant to Section 503(b) of the Act, U.S.C. § 503(b), and Section 1.106 of the Rules, 47 C.F.R. § 1.106, the petition for reconsideration is DENIED.

5. IT IS FURTHER ORDERED that, pursuant to 1.80 of the Rules, 47 C.F.R. § 1.80, W.P. Clark must pay the forfeiture amount of One Thousand Six Hundred Dollars ($1,600) within thirty (30) days of receipt of this Order. Payment may be made by check or money order payable to the Federal Communications Commission.[2] Please place NAL/Acct. No. 315ST0009 on the remittance and mail it to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

6. IT IS FURTHER ORDERED that a copy of this Order shall be sent to W.P. Clark and counsel.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

[1] Contrary to the attorney's contention, Petitioner was engaged in an activity for which a license is required and, therefore, a citation pursuant to 47 U.S.C. § 503(b)(5)(C) is not required.

[2] Requests for installment plans should be mailed to: Chief, Billings and Collections, Mail Stop 1110A2, 1919 M Street, N.W., Washington, D.C. 20554. Payment of the forfeiture in installments may be considered as a separate matter in accordance with Section 1.1914 of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Point Technologies NAL/Acct. No. 315NF00036
Orem, Utah

ORDER

Adopted: April 29, 1994; Released: May 10, 1994

By the Field Operations Bureau:

I. INTRODUCTION

1. Point Technologies filed a Petition for Reconsideration, requesting reconsideration of the monetary forfeiture of $7,000 issued for violation of Section 302(b) of the Communications Act of 1934, as amended, (the Act), and Section 2.803 of the Commission's Rules. For the reasons noted below, the Bureau reduces the monetary forfeiture.

II. BACKGROUND

2. On December 8, 1992, the Norfolk Field Office issued a Notice of Apparent Liability (NAL) to Point Technologies. The penalty was imposed for exhibiting the Point video board, a personal computer peripheral that was not certified and for not including the conspicuous notice. Based on the response from Point Technologies, the Norfolk Field Office issued a Notice of Forfeiture (NOF) for $7,000 on May 12, 1993. Point Technologies now appeals. The petitioner contends that a mock up rather than an actual computing device was on display at the computer show and it had no intention of selling the mock up. Next, the petitioner contends that it complied immediately after being notified of the violation. It also contends that this is the first time that it violated the Commission's rules.

III. DISCUSSION AND CONCLUSION

3. The arguments raised at paragraph 4 of the Petition for Reconsideration have been thoroughly considered and are incorporated herein by reference. Upon review of these arguments raised in the petition as well as review of the NAL and NOF, we find that the petitioner has not previously violated our rules and will adjust downward accordingly. As for the mock up, simply displaying a computing device or a mock up violates Section 2.803 of our rules if the device is not properly certified. Remedial action also does not mitigate liability.

IV. ORDERING CLAUSES

4. IT IS ORDERED THAT, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Section 1.106 of the Rules, 47 C.F.R. § 1.106, the petition for reconsideration is GRANTED in part and DENIED in part.

5. IT IS FURTHER ORDERED that Point Technologies must pay the forfeiture amount of Five Thousand Six Hundred Dollars ($5,600) within thirty (30) days of receipt of this Order. Payment may be made by check or money order payable to the Federal Communications Commission.[1] Please place NAL/Acct. No. 315NF00036 on the remittance and mail it to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

6. IT IS FURTHER ORDERED that a copy of this Order shall be sent to Point Technologies.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

[1] Requests for installment plans should be mailed to: Chief, Billings and Collections, Mail Stop 1110A2, 1919 M Street, N.W., Washington, D.C. 20554. Payment of the forfeiture in installments may be considered as a separate matter in accordance with Section 1.1914 of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Hugh R. Wisner NAL/Acct. No. 315AN0004
Kodiak, Alaska

ORDER

Adopted: April 29, 1994; Released: May 10, 1994

By the Chief, Field Operations Bureau:

I. INTRODUCTION

1. Hugh R. Wisner filed a Petition for Reconsideration, requesting reconsideration of the monetary forfeiture of $2,000 issued for willful violation of Section 301 of the Communications Act of 1934, as amended, 47 U.S.C. §301. For the reasons noted below, the Bureau reduces the monetary forfeiture amount to $1,600.

II. BACKGROUND

2. On October 13, 1992, the Anchorage Office issued a Notice of Apparent Liability (NAL) to Mr. Hugh R. Wisner. The penalty was imposed for operation of a radio station on the frequency of 4545.0 kHz, while on board the vessel JACQUELYN W (WYC4293), without any authorization by the Commission. Based on the response from Mr. Wisner, the Anchorage Office issued a Notice of Forfeiture (NOF) for $2,000 on December 17, 1992. Mr. Wisner now appeals. The petitioner contends that the radio came with a book "which did not show anyone using the frequency of 4545.0 kHz" and "there should not be a fine when there are no books which show who are on what station". Mr. Wisner also stated that a letter from the Anchorage Office (dated December 18, 1992) confused him when it instructed him to disregard "the event described in item 4 of the Notice" because that event did not occur and should not have been listed.

III. DISCUSSION AND CONCLUSION

3. The arguments raised in the Petition for Reconsideration have been thoroughly considered and are incorporated herein by reference. However, we note that the December 18, 1992, letter from the Commission's Field Office does not affect the outcome of the instant case. The NAL listed several days on which Mr. Wisner allegedly transmitted on the unauthorized frequency. The December 18, 1992, letter indicates that one of the days was incorrectly listed. Notwithstanding this, the NAL properly indicates at least one day on which Mr. Wisner improperly transmitted. Review of these arguments raised in the petition as well as review of the NAL and NOF, reveals Mr. Wisners' past history of compliance was not properly considered. Thus, the forfeiture amount will be reduced accordingly.

IV. ORDERING CLAUSES

4. IT IS ORDERED THAT, pursuant to Section 503(b) of the Act, U.S.C. § 503(b), and Section 1.106 of the Rules, 47 C.F.R. § 1.106, the petition for reconsideration is GRANTED in part and DENIED in all other respects.

5. IT IS FURTHER ORDERED, pursuant to Section 1.80 of the Rules, 47 C.F.R. § 1.80, that Hugh R. Wisner must pay the forfeiture amount of One Thousand Six Hundred Dollars ($1,600) within thirty (30) days of receipt of this Order. Payment may be made by check or money order payable to the Federal Communications Commission.[1] Please place NAL/Acct. No. 315AN0004 on the remittance and mail it to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

6. IT IS FURTHER ORDERED that a copy of this Order shall be sent to Hugh R. Wisner.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

[1] Requests for installment plans should be mailed to: Chief, Billings and Collections, Mail Stop 1110A2, 1919 M Street, N.W., Washington, D.C. 20554. Payment of the forfeiture in installments may be considered as a separate matter in accordance with Section 1.1914 of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Cable Airport NAL/Acct. No. 215LA0032
Upland, CA

ORDER

Adopted: April 29, 1994; Released: May 10, 1994

By the Chief, Field Operations Bureau:

I. INTRODUCTION

1. Cable Airport filed a Petition for Reconsideration, requesting reconsideration of the monetary forfeiture of $8,000 issued for violation of Section 503(b) of the Communications Act of 1934, as amended, (the Act), and Section 301 of the Act, 47 U.S.C. § 301. For the reasons noted below, the Bureau reduces the monetary forfeiture.

II. BACKGROUND

2. On September 17, 1992, the Los Angeles field office issued a Notice of Apparent Liability (NAL) to Cable Airport. The penalty was imposed for operating an unlicensed aeronautical advisory station (unicom). Based on the response from Cable Airport, the Los Angeles field office issued a Notice of Forfeiture (NOF) for $8,000 on October 8, 1992. Cable Airport now appeals. The petitioner contends that the unicom provides "safety of flight information" and that "If there were some infraction of the rules governing the operation of said station, it was not done either willfully or intentionally, and therefore the fine indicated is both excessive and punitive". The petitioner also contends that it was unaware that its license had expired until the inspection and immediately filed for special temporary authorization (STA). It also contends that the forfeiture would create a hardship.

III. DISCUSSION AND CONCLUSION

3. The arguments raised at paragraphs 3 and 4 of the Petition for Reconsideration have been thoroughly considered and are incorporated herein by reference. Upon review of these arguments raised in the petition as well as review of the NAL and NOF, we find that the petitioner fails to present any new arguments or evidence that was not previously addressed. It is incumbent upon the licensee to ensure that the license is properly renewed and remedial action, although commendable, does not mitigate liability.

4. Although the petitioner claims inability to pay the forfeiture, no documentation, such as tax returns or financial statements that were requested in the Notice of Apparent Liability, were submitted to support this claim. However, we note that the petitioner has not previously violated our rules and reduce the amount. Accordingly, the forfeiture amount is reduced.

IV. ORDERING CLAUSES

5. IT IS ORDERED THAT, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Section 1.106 of the Rules, 47 C.F.R. 0 § 1.106, the petition for reconsideration is GRANTED in part and DENIED in part.

6. IT IS FURTHER ORDERED that Cable Airport must pay the forfeiture amount of Six Thousand Four Hundred Dollars ($6,400) within thirty (30) days of receipt of this Order. Payment may be made by check or money order payable to the Federal Communications Commission.[1] Please place NAL/Acct. No. 215LA0032 on the remittance and mail it to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

7. IT IS FURTHER ORDERED that a copy of this Order shall be sent to Cable Airport.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

[1] Requests for installment plans should be mailed to: Chief, Billings and Collections, Mail Stop 1110A2, 1919 M Street, N.W., Washington, D.C. 20554. Payment of the forfeiture in installments may be considered as a separate matter in accordance with Section 1.1914 of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Bill Mathews NAL/Acct. No. 315ST0017
Coeur D' Alene, Idaho

ORDER

Adopted: April 29, 1994; Released: May 10, 1994

By the Chief, Field Operations Bureau:

I. INTRODUCTION

1. Bill L. Mathews filed a Petition for Reconsideration, requesting reconsideration of the monetary forfeiture of $2,000, issued pursuant to Section 503 of the Communications Act of 1934, as amended (the Act), 47 U.S.C. § 503, for violation of Section 301 of the Act, 47 U.S.C. § 301. For the reasons noted below, we are cancelling the monetary forfeiture.

II. BACKGROUND

2. On May 26, 1993 , the Seattle Office issued a Notice of Apparent Liability (NAL) to Bill L. Mathews. The penalty was imposed for unauthorized operation of a radio station on the frequency of 26.265 MHz. Based on the response from Bill L. Mathews, the Seattle Office issued a Notice of Forfeiture (NOF) for $2,000 on June 17, 1993. Bill L. Mathews now appeals. The petitioner contends he should not be liable because "he did not know the extra frequencies that were in the radio were illegal to use". He further states that he no longer owns the illegal radio equipment and the equipment no longer has the extra frequencies installed. Mr. Mathews also claims that he cannot afford to pay the $2,000 monetary forfeiture and submits financial information in support.

III. DISCUSSION AND CONCLUSION

3. The arguments raised in the Petition for Reconsideration have been thoroughly considered and are incorporated herein by reference. Upon review of these arguments as well as review of the NAL and NOF, we find that the petitioner does not present arguments that were not considered previously. However, we are cancelling the monetary forfeiture amount based on the financial information provided. This cancellation does not mean that the illegal radio operation did not occur, but that Mr. Mathews is not financially able to pay a forfeiture. However, the Petitioner's action did constitute a violation of Section 301 of the Act and may be considered in future proceedings for violations of the Act and/or rules.

IV. ORDERING CLAUSES

4. IT IS ORDERED THAT, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Section 1.106 of the Rules, 47 C.F.R. § 1.106, the petition for reconsideration is GRANTED and the monetary forfeiture is CANCELLED.

5. IT IS FURTHER ORDERED that a copy of this Order shall be sent by certified mail, return receipt requested to Bill L. Mathews.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Margaret G. Taylor NAL/Acct. No. 315VB0023
Windmere, Florida

ORDER

Adopted: April 29, 1994; Released: May 10, 1994

By the Chief, Field Operations Bureau:

I. INTRODUCTION

1. Margaret G. Taylor filed a Petition for Reconsideration, requesting reconsideration of the monetary forfeiture of $2,000 issued for violation of Section 301 of the Communications Act of 1934, as amended (the Act), 47 U.S.C. § 301. For the reasons noted below, we are cancelling the monetary forfeiture.

II. BACKGROUND

2. On May 25, 1993, the Commission's Vero Beach Office issued a Notice of Apparent Liability (NAL) to Margaret G. Taylor. The penalty was imposed for operating an unlicensed radio station on Amateur Radio frequency 145.53 MHz. Based on the response from Margaret G. Taylor, the Vero Beach Office issued a Notice of Forfeiture (NOF) for $2,000 on June 17, 1993. Margaret G. Taylor now appeals. The Petitioner contends that she should have been issued a warning prior to imposition of any forfeiture, and that she is unable to pay because of her age and financial condition.

III. DISCUSSION AND CONCLUSION

3. The arguments raised in Petitioner's letter, which is hereby accepted as a Petition for Reconsideration, have been thoroughly considered and are incorporated herein by reference. Upon review of these arguments as well as review of the NAL and NOF, we find that the amount of the forfeiture imposed exceeds Petitioner's ability to pay and, therefore, in accord with the Commission's forfeiture guidelines, reduced the amount of the forfeiture on this basis. Additionally, Petitioner was granted a reduction because she has no history of prior violations of Commission Rules. After these reductions, we have determined that Petitioner's liability is $0.00. Given this fact and considering all the circumstances present in this case, we are cancelling this forfeiture.

IV. ORDERING CLAUSES

4. IT IS ORDERED THAT, pursuant to Section 503(b) of the Act, U.S.C. § 503(b), and Section 1.106 of the Rules, 47 C.F.R. § 1.106, the petition for reconsideration is GRANTED and the monetary forfeiture is CANCELLED.

5. IT IS FURTHER ORDERED that a copy of this Order shall be sent by certified mail, return receipt requested to Margaret G. Taylor.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Nushagak Spirit NAL/Acct. No.315AN0040
Rio Vista, California

Liability for Forfeiture

ORDER

Adopted: April 29, 1994; Released: May 10, 1994

By the Chief, Field Operations Bureau:

I. INTRODUCTION

1. The Bureau has before it a letter submitted by Virginia Busey Ferrari as licensee of the ship radio station aboard the vessel NUSHAGAK SPIRIT, Official Number 587551, (Petitioner), requesting review of a $8,000 monetary forfeiture issued by the Commission's Anchorage, Alaska field office to Petitioner for the willful and repeated violation of Section 301 of the Communications Act of 1934, as amended (the Act), by operating the vessel's radio station on a frequency for which it held no authorization by the Commission. After review of the facts associated with this matter, we are reducing the forfeiture.

2. The appropriate amount of this forfeiture is $2,000.

II. BACKGROUND

3. On August 10, 11, and 16, and again on September 2, 1992, Commission employees monitored Petitioner's vessel radio being operated on 3809.7 kHz. That frequency is not allocated for use by ship radio stations and the NUSHAGAK SPIRIT possessed no license or other authorization issued by the Commission to authorize operation of its radio station on that frequency.[1]

4. On September 2, 1992, the Commission's Anchorage Office issued a Notice of Apparent Liability for monetary forfeiture (NAL) to Petitioner. On January 13, 1993, the Anchorage Office received a response from Ted C. Beltz who identified himself as the master of the vessel NUSHAGAK SPIRIT. After review of the response and other documents, the Anchorage Office issued an $8,000 forfeiture order to Petitioner on March 26, 1993.

III. DISCUSSION

5. Petitioner's vessel violated Section 301 of the Act by operating on a frequency not authorized for use by ship radio stations.

6. The violation was both repeated and willful.[2]

7. Petitioner has presented no facts or other information that would justify cancellation of the forfeiture. Pursuant to the Commission's forfeiture policy,[3] the base forfeiture amount for operating a radio station without an instrument of authorization, in services other than broadcast and common carrier, is $8,000. However, after due consideration of the circumstances presented in this class of unlicensed marine radio operation, we have determined that the appropriate amount for the first violation in this case should be reduced to $2,000. We are, therefore, reducing the instant forfeiture penalty accordingly. In reaching this decision, the factors specified in Section 503(b)(2)(D) of the Act and the Commission's Policy Statement[4] were considered.

IV. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), and Section 1.80(f) of the Commission's Rules, 47 C.F.R. § 1.80(f), that the licensee of the vessel NUSHAGAK SPIRIT FORFEIT to the United States the sum of two thousand dollars ($2,000) for the willful and repeated violation of Section 301 of the Communications Act.

9. IT IS FURTHER ORDERED, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Section 1.80(h) of the Commission's Rules, 47 C.F.R. § 1.80(h), that the forfeiture payment must be paid within thirty (30) days of the date of release of this Order.[5] Payment should be made by check or money order payable to the Federal Communications Commission, Attn: NAL/Acct. No. 315AN0040, and must be mailed to:

Federal Communications Commission
P.O. Box 73482
Chicago, IL 60673-7482

Forfeiture penalties not paid within 30 days may be referred to the U. S. Attorney for recovery in a civil suit. 47 U.S.C. § 504(a).

10. IT IS FURTHER ORDERED, that the Field Operations Bureau send one copy of this order to the station licensee and one copy to the vessel's master.

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[1] The Petitioner possesses a station authorization WUR2015 for the NUSHAGAK SPIRIT. This authorization, however does not authorize operations on the frequency 3809.7 kHz. This frequency is not authorized for use by ship radio stations.

[2] Section 312(f)(1) of the Act, which also applies to Section 503(b), provides: The term "willful", when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or by a treaty ratified by the United States. *See Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

[3] *See Policy Statement, Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993).

[4] *See* note 2 above.

[5] Petitioner may contact the Commission's Debt Collection Officer in the Billings and Collections Branch, Stop Code 1110A2, 1919 M Street, N.,W., Washington, DC 20554, if he is unable to pay the full amount within the period designated above and needs to make payment arrangements.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 92-237

In the Matter of

Administration of the North American Numbering Plan — Phases One and Two

NOTICE OF PROPOSED RULEMAKING

Adopted: March 30, 1994; Released: April 4, 1994

Comment Date: June 7, 1994
Reply Comment Date: June 30, 1994

By the Commission:

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Appendixes

Appendix A Comments on Phases One and Two

Appendix B Proposals for Numbering Policy Board or Similar Body

I. INTRODUCTION

1. Over thirty years before divestiture, the American Telephone and Telegraph Company (AT&T) developed and administered the North American Numbering Plan (NANP) to coordinate the telephone numbers used in most of North America.[1] The Plan of Reorganization that accomplished divestiture in 1984 transferred administration of the NANP from AT&T to Bell Communications Research, Inc. (Bellcore), an entity owned by the seven Regional Bell Operating Companies (RBOCs).[2] Administration of the NANP has evolved from its earlier focus on conventional area codes to include other numbering resources such as service access codes (*e.g.*, 500 and 900 codes), N11 codes (*e.g.*, 411), and carrier identification codes. As a result, the NANP administrator coordinates many of the telephone numbers used in North America. To explore issues pertaining to future administration of these numbering resources under the NANP, we opened this docket with a Notice of Inquiry (*NOI*) in October 1992.[3]

2. At the outset, we note that adequate telephone numbers, available through a uniform numbering plan, are essential to provide efficient access to new services and technologies and to support continued economic growth. The telecommunications industry will require many additional telephone numbers to accommodate the increasing consumer demand for existing communication services such as facsimile transmission, cellular telephony, and pagers and also to meet the expected demand for new services such as personal communications systems and other new mobility services. Because of the importance of telephone numbers and the many different concerns raised regarding them, the NOI was structured to address both narrower technical issues and broader policy questions concerning future administration of these numbers.

3. Specifically, the *NOI* divided this docket into two phases: Phase One, which requested comments on the identification of an appropriate entity to administer the NANP, future funding for such administration, and how such administration might be improved; and Phase Two, which sought comment on the costs, benefits, and technical issues associated with expanding Feature Group D (FGD) Carrier Identification Codes (CICs) from a three-digit to a four-digit format.[4]

4. In this *Notice*, we discuss each phase in a separate section. In Section II, which addresses Phase One, we tentatively conclude that ministerial administration of the NANP should be undertaken by a single, non-government

[1] The NANP now covers 18 nations: Anguilla, Antigua and Barbuda, Commonwealth of the Bahamas, Barbados, Bermuda, British Virgin Islands, Canada, Cayman Islands, Dominican Republic, Grenada, Jamaica, Montserrat, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Trinidad and Tobago, Turks and Caicos, and the United States (including Puerto Rico and the U.S. Virgin Islands).

[2] The amended Plan of Organization was approved by the U.S. District Court for the District of Columbia in *U.S. v. Western Electric Co.*, 569 F. Supp. 1057 (D.D.C. 1983).

[3] Administration of the North American Numbering Plan, CC Docket No. 92-237, 7 FCC Rcd 6837 (1992).

[4] In response to the *NOI*, we received comments from a broad cross-section of local exchange carriers (LECs), interexchange carriers (IXCs), competitive access providers (CAPS), regulators, and others. Most parties commented on both phases in their initial comments. Appendix A lists parties filing comments, reply comments, or both, in response to either phase of the *NOI*.

entity. We seek comment on whether a new board should be created to assist in establishing numbering policy and resolving disputes, subject to oversight by this Commission and other regulators. We also tentatively conclude that this Commission should impose fees to recover its costs of regulating numbering resources. In addition, we seek comment on whether this Commission, with other World Zone 1 regulators, should impose mandatory number charges to finance the international administration of the NANP. In Section III, which discusses issues raised in Phase Two of the *NOI*, we tentatively conclude that we should establish a transition period of six years for the expansion of FGD CICs to a four digit format. In addition, we seek comment on whether we should require LECs in equal access areas to deliver interstate, intraLATA "1+" Message Telephone Service (MTS) calls to the carrier preselected by the end user. We also invite comment on the other proposals and tentative conclusions discussed in this *Notice*.

II. PHASE ONE OF THE DOCKET

A. Background

5. In Phase One of the *NOI*, we sought comment on whether Bellcore should continue as administrator of the NANP or be replaced by another entity. We also invited comment on how NANP administration might be improved and funded.[5] In addition, we requested comment on numbering for personal communications services and on local number portability. We also tentatively addressed various other numbering issues.[6]

6. Since the *NOI* was released in October 1992, there have been several significant developments on numbering issues. For instance, Bellcore has advised us that it desires to relinquish administration of the NANP.[7] In addition, many industry numbering activities have now been consolidated in a single Industry Numbering Committee (INC).[8] Also, the Future of Numbering Forum (FNF), attended by a broad cross-section of the telecommunications industry, has focused its efforts on broad proposals to improve the administration of the NANP while referring more specific issues to the INC.[9]

7. Based upon our experience with numbering issues as well as the comments received in this docket, we find that the overall administration of the NANP necessarily involves four separate, but related, functions: policy-making; dispute-resolution; maintenance of number databases; and processing applications for numbers. Accordingly, this *Notice* considers the need for better defined mechanisms to handle each of these functions as well as the identification of a new administrator and procedures for funding NANP administration and this Commission's related regulatory activities.

8. Before discussing these substantive matters, we briefly address our jurisdiction over telephone numbers.[10] Under Section 2(a) of the Communications Act, 47 U.S.C. § 152(a), this Commission has broad jurisdiction over "all interstate and foreign communication by wire or radio . . . which originates ... or is received within the United States." More specifically, under Section 201(a) of the Act, 47 U.S.C. § 201(a), it is "the duty of every common carrier engaged in interstate or foreign communications . . . in accordance with the orders of . . . [this] Commission, . . . to establish physical connections with other carriers, to establish through routes . . . applicable thereto . . . and to establish and provide facilities and regulations for operating such through routes." Telephone numbers are an indispensable part of the "facilities and regulations" for operating these "through routes" of physical interconnection between carriers and are therefore subject to our plenary jurisdiction under the Act.[11] Accordingly, this Commission may issue orders and otherwise regulate such numbers and their administration.

B. International Implications

9. Among the 18 countries in World Zone 1, the NANP allows international calls to be dialed without the need for international access codes and international country codes. The advantages of widespread access to such a seamless network are considerable. The European community is now seeking to integrate their national numbering plans to achieve the same benefits and efficiencies already experienced in World Zone 1. Accordingly, the *NOI* sought comment on the costs and benefits of continuing the current internationally integrated numbering plan.[12]

10. Continuance of an integrated numbering system within World Zone 1 increases the complexity of establishing a new NANP administrative structure. For example, any fees imposed by this Commission would ordinarily apply only to numbers, carriers, and other entities within our jurisdiction. Notwithstanding such challenges, we recognize the importance of international coordination to the continued success of the NANP. Thus, we invite comment on the international implications of the proposals in this

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[5] *NOI*, 7 FCC Rcd at 6837 (para. 3).

[6] *NOI*, 7 FCC Rcd at 6842 (paras. 40-41).

[7] Letter from G. Heilmeier, President and CEO, Bellcore, to Commission (Aug. 19, 1993).

[8] In July 1993, the Industry Carriers Compatibility Forum (ICCF) formally established the INC as a standing committee to supervise all industry work relating to the assignment and use of NANP numbering resources. The ICCF was established by the Carrier Liaison Committee of the Alliance for Telecommunications Industry Solutions (ATIS) formerly known as the Exchange Carrier Standards Association (ECSA).

[9] Bellcore established the FNF to consider and act upon its January 1992 Proposal on the Future of Numbering in World Zone 1 and related matters.

[10] Broadly speaking, "telephone numbers" describe not only the numbering plan area (NPA) code, central office (CO) code, and station or line number that comprise the familiar ten-digit number used to make telephone calls, but also a variety of other numbers and codes necessary for effective and efficient telecommunications. For example, telephone numbers also include carrier identification codes (CICs), available service codes (N11 codes), and vertical service codes. Vertical service codes (*e.g.*, *74) are used by LECs to provide end users with special services such as call forwarding and call tracing.

[11] *See* The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, 2 FCC Rcd 2910, 2912 (para. 19)(1987), *recon.* 4 FCC Rcd 2369, 2369-70 (para. 7) (1989) (Commission asserts plenary jurisdiction over CO codes).

[12] *NOI*, 7 FCC Rcd at 6840 (para. 28). *See, e.g.*, MFS, comments, p. 6 (noting existence of other national regulatory authorities); Ameritech, comments, p. 5 (urging retention of current internationally integrated system).

Notice for the selection, organization, and funding of a replacement NANP administrator. In particular, we will forward copies of this *Notice* to the appropriate foreign authorities in the countries covered by the NANP and solicit their views on these matters.[13]

C. A New Administrator

11. Bellcore, the current NANP administrator, assigns numbers in accordance with principles and guidelines established through industry consensus procedures. Thus, the administrator does not normally set policy or resolve disputes. In the *NOI*, we asked how the administrative process might be improved. Many commenters assert that the ministerial functions now performed by Bellcore should be assigned to a registrar entity while policy issues and dispute resolution should be the responsibility of a new organization solely concerned with numbering policy.[14] In this sub-section, we address the identification of the next NANP administrator as well as the specific administrative functions to be performed by that administrator. In the following sub-section, we consider the functions of policy-making and dispute resolution.

12. To assume the role of NANP administrator, commenters suggest various existing public and private organizations or recommend the creation or use of non-government entities. Some commenters believe that this Commission should administer the NANP because we must ultimately decide many of these numbering issues.[15] If not undertaken solely by this Commission, Ad Hoc contends such administration should be a joint responsibility of this Commission and the National Association of Regulatory Utility Commissioners (NARUC).[16] If this Commission chooses not to handle such administration, MFS urges that the National Telecommunications and Information Administration (NTIA) assume sole responsibility for such administration.[17] Some commenters note the availability of existing, non-government entities such as NECA and ATIS, while others suggest the use of private firms for such purposes.[18] Among U.S. government agencies, it initially appears that NTIA, the Department of State, or this Commission could undertake the NANP administrative functions within our national jurisdiction.

13. NTIA, the Department of State, and this Commission each have, or could acquire, the necessary expertise. Among other qualifications, the State Department has experience in international communications issues. NTIA has experience in spectrum management that would be useful in number administration. In addition to the Commission's experience in such areas, we are also familiar with specific numbering issues that have been the subject of Commission proceedings, have worked with the current NANP administrator, and participated in numbering forums and similar activities. Moreover, under recent legislation, costs incurred by this Commission in performing such functions, as well as other related regulatory activities, could be recovered through fees.[19]

14. While this experience suggests that this Commission may be the most appropriate government entity to administer the NANP in the future,[20] we believe it would be more efficient if the ministerial tasks of assigning national numbering resources and other less controversial functions were vested in others while we focused our resources upon oversight and larger numbering policy issues. Therefore, we tentatively conclude that no U.S. government agency is ideally suited to administer the U.S. portion of the NANP, but that, based upon our experience and expertise, this Commission could best assume those ministerial functions if they are to be performed by any such agency.

15. We also have considered existing, non-government entities, including the National Exchange Carrier Association (NECA) and the Alliance for Telecommunications Industry Solutions (ATIS, formerly the Exchange Carrier Standards Association) as possible administrators of the NANP. Established by the LECs in response to a 1983 order of this Commission,[21] NECA has considerable knowledge of the telecommunications industry and significant experience in collecting and disbursing funds for Commission programs. The ATIS, originally established to set and coordinate industry standards, has considerable knowledge of numbering issues through the activities of its various committees and forums. Because of its close identification with the LEC industry segment, however, NECA -- like Bellcore today -- would inevitably face questions regarding its impartiality. For this reason, we tentatively conclude that NECA could not effectively perform these administrative functions at this time. While in the past ATIS has also been closely identified with LECs, we note that ATIS recently expanded its governing board and its membership to include many entities which are not LECs. Accordingly,

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[13] *See* note 1, *supra*, for a list of these countries.

[14] See Appendix B for summaries of proposals received in this docket for numbering policy boards, councils, and similar entities.

[15] *See, e.g.*, Allnet, comments, p. 2. GTE notes that at one time this Commission assigned Data Network Identification Codes. GTE, comments, p. 6.

[16] Ad Hoc, comments, p. 30; *But see*, NYNEX, comments, pp. 5-6 (contending complex technical issues mandate continued use of industry consensus approach and suggesting that Commission leave ministerial functions to others).

[17] MFS, reply comments, p. 2-5.

[18] *See, e.g.*, USTA, comments, pp. 4-5 (arguing disadvantages of industry groups); *See, e.g.*, CTIA, comments, p. 5 (suggesting that NANP administrative function be made available for competitive bids by private firms). *See also*, Telocator, comments, pp. 5-6; Metrocall, comments, p. 5 (recommending that private firms bid on a contract for NANP administration and that the contract be awarded to the bidder that proposes the lowesth) per number charge). *But see* MCI, reply comments, p. 4 (opposing any competitive bids in favor of Commission selection or establishment of an administrator).

[19] *See* Omnibus Budget Reconciliation Act of 1993, P.L. No. 103-66, approved Aug. 10, 1993 (*Omnibus Budget Reconciliation Act)*. The Communications Act now provides for regulatory fees as well as application fees.

[20] We do not believe it would be practical to establish a joint FCC/NARUC administrative entity at this time to handle number administration within World Zone 1. Even if such an entity were established at NARUC, that association's structure and deliberative processes would be too unwieldy to promptly address the many complex and often time-sensitive issues incident to such administration. However, if specific problems arise involving the jurisdiction of state and other local regulators, we would anticipate working either informally with NARUC, or more formally, through a federal-state joint board to resolve those problems.

[21] MTS/WATS Market Structure, Third Report and Order, 93 FCC 2d 241 (1983).

we seek comment on whether ATIS or some component of ATIS could handle future NANP administration subject to our oversight.

16. Alternatively, these functions might best be performed by a new, non-government entity.[22] If the Commission were to establish such a separate, non-government entity, we could reasonably assure that the new administrator would not be closely indentified with any particular industry segment, yet also accountable to regulators and responsive to the needs of the industry. We could also be in a position to assure that the new administrator would be adequately funded and staffed, yet subject to appropriate financial and other management controls. Accordingly, we seek comment on whether we should establish, subject to our oversight, a new, non-government entity to handle future administration of the NANP.

17. Finally, we believe that the next administrator should be designated promptly and that shifting administrative responsibilities from Bellcore to the new entity should begin as soon as possible after its designation. In view of the importance of the implementation of interchangeable numbering plan areas (INPAs) to the continued success of the NANP, however, we tentatively agree with those who contend that any change to a new administrator should be deferred until such implementation is completed.[23] Accordingly, to maintain continuity in the course of such implementation, we tentatively conclude that the transition period should begin as soon as the new administrator is identified, and that it should extend to a date at least six months after the change to INPAs in January 1995.

18. In sum, we tentatively conclude that NANP administrative functions would best be performed by a single, non-government entity established by this Commission and, therefore, subject to our oversight but also separate from this Commission and not closely identified with any particular industry segment. We request comment on these tentative conclusions and on the parameters defining mission, management, structure, functions, personnel, and capabilities of a new NANP administrator.

D. Policy Making and Dispute Resolution

19. As with the development of technical standards, most numbering issues have been addressed by forums and other consensus-building processes within the industry rather than through proceedings undertaken by government agencies. The *NOI* sought comment on how to provide the most effective oversight of the NANP, noting earlier requests that such forums include more open and equitable administrative processes that encourage participants to be more accountable. In general, we asked how this Commission should oversee Bellcore or any other entity charged with NANP administration and what advisory or oversight bodies, if any, should be established. The *NOI* also sought comment on whether alternative dispute resolution techniques such as mediation, arbitration and negotiated rulemaking could be applied to situations in which the industry is unable to achieve consensus.

20. Several commenters question current consensus procedures and urge greater Commission involvement in resolving numbering issues. Some claim that far too many groups have responsibility for or oversight over numbering issues.[24] MCI complains that "forum shopping" may be used by larger organizations to achieve anti-competitive objectives at the expense of smaller organizations.[25] Cox criticizes current consensus procedures, claiming that they favor the parties with the most resources because active participation requires "incredible stamina and enormous, dedicated resources."[26]

21. On the other hand, Ameritech maintains that current Bellcore and industry forum procedures are the most effective way to maintain the current integrated and cost-effective multinational plan to provide an adequate supply of numbers and codes on a non-discriminatory basis to all qualified carriers and customers.[27] NYNEX agrees, contending that these existing forums and related industry consensus procedures are adequate to provide "advice and guidance" to the NANP administrator under the Commission's policy direction and with input from state regulators.[28] Even supporters of existing consensus procedures, however, acknowledge the current fragmentation of policy-making and the attendant difficulties for industry participants.[29]

22. While some commenters encourage establishment of more formal procedures to avoid or resolve disputes that arise following adoption of numbering policies, there did not appear to be significant support for alternate dispute resolution procedures such as mediation and arbitration.[30] Other commenters urge more active Commission involvement in policy-making, resolution of disputes, and supervision of NANP administration.[31]

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[22] This Commission relies on non-government entities for assistance in other areas involving the coordinated use of limited resources under our jurisdiction. For example, private land mobile license applications that require frequency coordination are first sent to non-government frequency coordinators who review the applications, coordinate the use of designated frequencies, and provide other services. *See* Section 332(b)(1) of the Communications Act, 47 U.S.C. § 332(b)(1) and Sections 90.127, 90.175-90.176, of the Commission's Rules, 47 C.F.R. §§ 90.127, 90.175-90.176.

[23] *See, e.g.*, USTA, reply comments, p. 3. *But see*, Cox, reply comments, p. 4-5; Sprint, reply comments, p. 3; MCI, reply comments, pp. 4-5; MFS, reply comments, p. 3; Telocator, reply comments, pp. 7-9 (urging prompt selection of new neutral administrator to handle INPA implementation and other issues).

[24] CTIA claims 12 separate forums or other entities address 26 specific numbering issues. CTIA, comments, p. 2. *See also* Cox, comments, pp. 12-13.

[25] MCI, comments, p. 17.

[26] Cox, comments, p. 6 (citing, as an example of the problem, the lengthy process leading to development of NXX code assignment guidelines).

[27] Ameritech, comments, pp. 2,4.

[28] NYNEX, comments, p. 2. *Accord*, Bellcore, comments, pp. 6-7 (acknowledging current consensus procedures may be imperfect but contending such procedures have been successful).

[29] Bellcore, comments, p. 8; Southwestern, comments, p.5 (suggesting a single forum to address all issues not specifically addressed in standards arena).

[30] *See, e.g.*, Pacific, comments, pp. 5-6 (contending arbitration and mediation may be useful for fact-based disputes but not for policy-based disputes).

[31] McCaw, reply comments, p. 8; Cox, comments, p. 10 ; NPTC, comments, p. 3; MFS, comments, p. 5. *But see* NYNEX, comments, p. 5; SNET, comments, p. 4.

23. To promote more Commission involvement in these areas, commenters suggest various structural changes. Many favor establishing a new numbering policy board, council, or similar body that would, depending on the proponent, establish numbering policy subject to Commission review, supervise forum consideration of numbering policies, resolve disputes between parties and forums, retain and supervise the NANP administrator, and/or establish a funding mechanism for NANP administration as well as its own activities. Appendix B contains a summary of these proposals. Others do not appear to support creation of a new entity but rather favor consolidation of numbering issues before one of the existing forums or this Commission. As noted earlier, since the release of the *NOI*, two industry forums -- the Future of Numbering Forum and the Industry Numbering Committee -- have been established to meet this goal.

24. Although existing forums have been able to achieve consensus solutions of many important issues among diverse groups -- including not only representatives of industry and users but also of various regulatory and consumer organizations -- no regular mechanism appears available to decide issues or resolve disputes when no consensus or other agreement can be reached. Thus, the existing system of forums with their reliance on consensus may be deficient in that difficult decisions may be unreasonably delayed or simply not made at all. Disputes between parties as well as broader policy issues, can, in theory, be resolved through complaints to this Commission, petitions for declaratory rulings, and other existing procedures. However, we recognize that such procedures may be time-consuming and cumbersome and may cause this Commission and other regulatory bodies to expend significant resources to resolve relatively minor disputes and policy issues that might be handled better by a special body established for that purpose.

25. We seek comment on whether we should establish a new policy board to assist regulators in developing and coordinating numbering policy under the NANP. Subject to regulatory oversight, such a board might also guide the new NANP administrator and either resolve numbering disputes itself, encourage mediation or arbitration, or refer such matters to this Commission. Such a board might offer a less-burdensome alternative to existing policy-making and dispute resolution procedures. Thus, any rights of interested parties to seek the intervention of regulatory agencies through complaints, petitions, and other existing procedures would not be impaired. We seek comment on our legal authority and the procedures available to establish such a board. We also seek comment on the following related procedural matters: whether this Commission and/or others should appoint board members; the appropriate representation of United States entities such as domestic carriers and users including federal and state government regulators; the appropriate representation of foreign carriers and users including foreign regulators and international bodies; the terms and conditions of board membership; meeting procedures and the board chair; appeal of board decisions; and the size and staffing of the board. We also seek comment on the extent, if any, to which the Federal Advisory Committee Act[32] would apply to such a board.

E. Functions of the NANP Administrative Organization

26. The current NANP administrator, Bellcore, assigns the following numbers: Numbering Plan Area (NPA) codes -- popularly known as "area codes"; central office (CO) codes for 900 numbers (*e.g.*, 900-692-XXXX);[33] Carrier Identification Codes (CICs) that enable IXCs and others to have more direct access to the public switched network;[34] service access codes (N00) (*e.g.*, 300, 500), service codes (N11 codes); (N11 codes) (*e.g.*, 411, 711);[35] and CO codes (NXX) within NPA 809 for Bermuda and the Caribbean.[36]

27. Bellcore also assigns vertical service codes used by LECs (*e.g.*, *73 for "call forwarding activation"). Under an agreement with the T1 Committee of ATIS,[37] Bellcore administers SS7 network address codes and, in response to an agreement of the Industry Carriers Compatibility Forum (ICCF), administers Automatic Number Identification (ANI) II digits.[38] In light of the evolution of telecommunications technology and the national information infrastructure, we expect the number and complexity of those functions to increase, making successful administration even more critical to this Commission's goal of rapid, efficient wire and radio communications service worldwide.[39]

28. Some commenters argue that the NANP administrator should assume the responsibility for assigning central office (CO) codes in all NPA areas.[40] Centel urges Commission administration of CO codes to ensure that cellular carriers are not prevented from obtaining essential codes.[41] Similarly, MFS submits that CO codes should either be

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[32] Federal Advisory Committee Act, P.L. No. 92-463, 5 U.S.C., Appendix 2.

[33] The NANP administrator generally does not assign Central Office (CO) (NXX) codes within each NPA. Assignment of these codes is currently made by the largest LEC within each NPA -- often but not always a Regional Bell Operating Company (RBOC).

[34] Paragraph 45 and 46, *infra*, explain the significance of these CICs.

[35] These service codes represent an extremely scarce resource in which there has been increased interest in recent years. *See* The Use of N11 Codes and Other Abbreviated Dialing Arrangements, CC Docket No. 92-105, 7 FCC Rcd 3004 (1992).

[36] Prior to April 1, 1993, Bellcore also assigned NXX codes for 800 numbers.

[37] The Alliance for Telecommunications Industry Solutions (ATIS) was formerly known as the Exchange Carrier Standards Association (ECSA). *See* para. 15, *supra*, for additional information on ATIS.

[38] Bell Communications Research, Inc. (Bellcore), North American Numbering Plan Administrator's Proposal on the Future of Numbering in World Zone (WZ) 1 (Future of Numbering Proposal), (2d. ed.), Jan.4 , 1993, Appendix C; National Association of Regulatory Utility Commissioners, Petition for Notice of Inquiry, filed Sept. 26, 1991, pp. 3-4.

[39] Some note that the NANP administrator may be assigning additional number resources including: (1) new codes for the Intermediate Signalling Network Identifier (ISNI) used with the SS7 signalling network; (2) numbers for the Public Switched Digital Service (PSDS); and (3) numbers for Personal Communications Service (PCS). *See, e.g.*, NARUC, comments, p. 2.

[40] *See, e.g.*, Ad Hoc, comments, p. 29; McCaw, comments, p. 8; Teleport, comments, p. 5-6. BellSouth, comments, p. 2, 24; Bell South, reply comments, p. 7 n.6.

[41] Centel, comments, p. 3 n.1.

assigned by national authorities, such as this Commission or NTIA, or by state regulatory agencies operating under consistent national guidelines.[42]

29. As Bellcore prepares to transfer its NANP functions to a new administrator, we tentatively conclude that the new NANP administrator should not only assume those functions customarily performed by Bellcore but should also perform the additional functions associated with the assignment of CO codes. We believe that the public interest would be served by centralizing CO code functions at this time, at least for those CO codes used within the United States, pending review of the actual operation of the CO code guidelines adopted by the ICCF in July, 1993. We seek comment on these conclusions.

F. Funding for NANP Administration

1. Background

30. The NOI requested information on how the costs of NANP administration should be recovered in the future.[43] In designing a new system to recover the administrative costs of the NANP, commenters stress the importance of a fair and equitable allocation of the costs to all who use the numbers or otherwise benefit from the related number planning, implementation, and administration.[44] CSCN adds that impartial numbering administration will only be perceived to occur if funding is provided "on the widest industry base practicable -- including all of North America."[45]

31. As we consider alternatives to fund administration of the NANP, we again note the complexities of administering a numbering plan that covers not only the United States but also other countries as well. While the funding mechanisms we consider here focus primarily on raising funds from United States sources, we also invite comment on how the costs of administering an internationally integrated plan might be shared among the countries involved.

2. Application and Regulatory Fees

32. Under the Omnibus Budget Reconciliation Act, this Commission has authority to collect not only "application fees" but also "regulatory fees to recover the costs of [our] . . . enforcement, policy and rulemaking activities, user information services, and international activities."[46] As our current oversight of numbering issues involves each of these four activities, it appears we could collect additional regulatory fees for oversight of NANP administration.

33. If this Commission were to assume the role of NANP administrator, the use of application and regulatory fees may provide a means of fully recovering the costs of administration from those who most directly benefit from that service in the United States.[47] If an entity separate from the Commission were established, such fees could be used to recover the Commission's costs in overseeing such administration. In addition, if such an entity were retained under a contract with the Commission, we seek comment on whether such fees could also be used to offset the costs of that contract. We also invite comment on the procedural steps necessary to implement this proposal to cover the Commission's costs.

3. Other Cost Recovery Mechanisms

34. There are a number of other mechanisms that might be employed to recover those NANP administrative costs that might not be offset by Commission fees, for example, if an entity separate from the Commission administers the NANP. These include voluntary contributions, charges for numbering resources, and other funding alternatives.

a. Voluntary Contributions

35. Several commenters support voluntary industry funding of NANP administration. For example, MCI recommends that administrative expenses be recovered through a system of voluntary contributions similar to the contribution scheme employed by the Telecommunication Standards Sector of the International Telecommunication Union (TSS/ITU).[48] One advantage of such a voluntary scheme would be its flexibility. It may also facilitate participation by non-U.S. entities that benefit from NANP administration but which might not be subject to our proposed numbering fees. However, a scheme relying on voluntary contributions could result in fluctuating income which, in turn, could frustrate budget and other operational planning. We seek comment on these issues and, in particular, how NANP administrative costs should be recovered from number users outside the United States.

b. Charges for Numbering Resources

36. The record in this docket includes many proposals to collect funds from those who request and use numbering resources. For example, some contend that the administrative costs should be borne by carriers in proportion to the number resources directly assigned to them.[49] Others suggest an arrangement under which charges would be collected both for the assignment of new numbers and for the

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[42] MFS, comments, p. 42.

[43] *NOI*, 7 FCC Rcd at 6840-6841 (paras. 28, 33-35).

[44] NARUC, comments, p.4; Cox, comments, p. 11-12; Southwestern, reply comments, p. 6.

[45] CSCN, comments, p. 1.

[46] Section 8 of the Communications Act provides for the collection of "application fees" and Section 9 of the Act now provides for "regulatory fees." *See* Title VI of the Omnibus Budget Reconciliation Act, Section 6003.

[47] Under Section 9(b)(1)(A) of the Communications Act, as amended by the Omnibus Reconciliation Act, the amount of the "regulatory fees" to be collected for a given activity is derived by determining the full-time equivalent number of employees performing the activit[y] ... adjusted to take into account factors that are reasonably related to the benefits provided to the payor of the fee by the Commission's activities ...." Omnibus Budget Reconciliation Act, Section 6003.

[48] MCI, reply comments, p. 15. See Appendix B for other proposals for self-funded organizations to handle or supervise NANP administration.

[49] Teleport, comments, pp. 3-6, CTIA, comments, p. 5; NPTC, comments, p. 3 (favors funding based upon amount of numbers an organization controls); Vanguard, comments, p. 5 (supports small charge per user; contends charge might be as little as one cent per month); Sprint, comments, p. 7 (favors counting customers to determine amount due from each carrier but carriers with smaller customer counts would be exempt). *But see* MCI, reply comments, p. 5 (opposes such proportional approaches as unfair burden on larger carriers).

continued use of previously assigned numbers.[50] Some commenters recommend that any numbering charges be paid to a new NANP policy board or similar body which, in turn, would use these funds to establish and finance the NANP administrator.[51] Others suggest such charges be paid directly to the NANP administrator.[52] As noted above, others urge this Commission to collect fees for these purposes. To recover those NANP administrative costs not offset by Commission application or regulatory fees, *i.e.*, costs not related to Commission administration, we seek comment on whether the costs of NANP administration would best be recovered by a system of cost-based number charges established with other World Zone 1 regulators and payable directly to the new NANP administrator by those who are assigned telephone numbers and those who otherwise directly benefit from NANP administration. We note, however, that under this proposal, collection and disbursement of such charges would be subject to oversight by the proposed policy board and relevant regulators.

c. Other Funding Alternatives

37. While we invite comment on whether the costs of NANP administration would be best recovered through Commission fees or other cost-based charges, there may be other reasonable funding alternatives. For example, this Commission could establish a new numbering administration fund supported by mandatory contributions, impose a mandatory numbering surcharge on one of NECA's existing funds, or simply authorize the use of annual surpluses from one or more of these funds (*e.g.*, the Telecommunications Relay Services (TRS) fund) to support number administration. Just as this Commission employed Section 203 of the Act to establish the carrier common line pool.[53] we tentatively conclude that we have authority under Sections 201 and 203[54] to create a similar fund or pool to finance future NANP administration. One advantage of using surpluses from existing funds or a surcharge may be that funds could be collected more quickly. In addition, these administrative costs could be spread over a large number of entities thus reducing the burden on any particular entity or group. A disadvantage is that those who primarily benefit from number administration might not necessarily be the ones who bear the primary burden of any surplus or surcharge formula. We invite comments on these tentative conclusions.

38. Our plans for future funding of NANP administration may be summarized as follows: first, we propose to establish a set of Commission fees payable by those who are assigned or who otherwise directly benefit from the use and regulation of telephone numbers within the United States portion of World Zone 1. These fees would be used to offset the costs incurred by this Commission in regulating numbers. We also seek comment on whether such fees could be used to accomplish other Commission objectives. Second, in the event there are NANP administrative costs not covered by Commission imposed fees, we propose to establish, with other World Zone 1 regulators, a system of charges payable directly to the new NANP administrator by those who directly benefit from operation of the NANP subject to appropriate oversight. If only a small amount of funds is needed each year in comparison with the administrative costs of establishing and maintaining a new system of charges for those who benefit from NANP operation, a third alternative might be to use surpluses from an existing NECA fund or to impose a small surcharge on contributors to such a fund to finance the administration of telephone numbers in the United States.

G. Other Numbering Issues

39. The *NOI* sought comment on numbering for personal communications services (PCS) and on local number portability. Several LECs contend that Commission action on PCS numbering should be deferred until PCS becomes more defined and a numbering scheme is developed through appropriate industry forums.[55] Cox, McCaw, MCI, and others disagree and urge the Commission to address PCS numbering issues promptly, contending that broad availability of PCS itself will depend on the availability of appropriate numbers on a non-discriminatory basis and in a format that does not disadvantage some competitors.[56] Specifically, they ask this Commission to declare as soon as possible that existing mobile service providers may obtain PCS N00 NXX codes on a non-geographic, non-discriminatory basis.[57]

40. In June 1993, following release of the NOI, the administrator of the NANP announced that, in August 1993, absent contrary instructions from the Commission, it would assign the 500 service access code for PCS and within that code would proceed to assign NXX codes to certain companies that had requested expedited assignment.[58] Subsequently, several parties requested that the Commission review this matter, in part, because only a limited record existed on this issue.[59] The Common Carrier Bureau directed a delay in the proposed assignment and

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[50] Cox, comments, pp. 11-12; PageNet, comments, pp. 6-7.

[51] *See, e.g.*, CTIA, comments, p. 5.

[52] *See, e.g.*, Ameritech, comments, pp. 10,15.

[53] *See* MTS and WATS Market Structure, CC Docket No. 78-22, Phase 1, Third Report and Order, 93 FCC 2d 241, 334 (para. 343) (1983).

[54] As noted above, the Commission exercises jurisdiction over telephone numbers under Section 201(a) of the Act, 47 U.S.C. § 201(a). Section 201(b) of the Act, 47 U.S.C. § 201(b), includes a broad grant to the Commission of authority to prescribe necessary rules and regulations. Also, the Commission has authority to modify any requirements made by or under the authority of Section 203 of the Communications Act, relating to schedules of charges. *See* Section 203(b)(1) of the Act, 47 U.S.C. § 203(b)(1).

[55] Ameritech Comments at 11 (noting current PCS numbering activities of TSS/ITU, T1 Committee of the ECSA, and of the ICCF); Bell Canada, comments, p. 4; GTE, comments, p. 13-15; NYNEX, comments, p. 7; Rochester, comments, p. 4.

[56] Cox, comments, p. 1; MCI, reply comments, p. 16-18; McCaw, comments, p. 17; *see also*, APC, comments, p. 1-4; GTE, comments, p. 15; Metrocall, comments, pp. 2, 7-8; PageNet, comments, p. 8; Telocator, comments, p. 13; Telocator, reply comments, p. 5-6.

[57] McCaw, comments, p. 17; *see also*, Fleet Call, reply comments, pp. 5-7; MCI, comments, p. 30; Telocator, comments, p. 13; Telocator, reply comments, pp. 5-6.

[58] Letter from R. Conners, Director, NANP Administration, Bellcore, to K. Levitz, Acting Chief, Common Carrier Bureau (June 23, 1993).

[59] *See, e.g.*, hLetter from J. Bork, U.S. West, to R. Conners, Director, NANPA (July 7, 1993). *See also*, Letters, dated July 28, 1993, to K. Levitz, Acting Chief, Common Carrier Bureau, from

has invited comments on the issues involved.[60] In light of these developments, we will not take further action on PCS numbering in this docket.

41. Local number portability issues also attracted many comments. Depending on the definition of the term,[61] the parties contend that local number portability is either: (a) available, at least to some extent, at the present time;[62] (b) not presently available but sufficiently feasible and important that this Commission should, following an inquiry, order LECs to provide it upon reasonable request;[63] (c) not feasible at all; or (d) feasible to such a limited degree that it should not be required pending further study by state regulators and industry forums.[64]

42. Providing local number portability in each of the current 160 geographic NPAs would appear to be at least equal in complexity and cost to the current nationwide 800 database system without taking into account the need for interactions between NPAs.[65] We recognize the importance of local number portability to the promotion of competition in the local exchange market. However, we believe far more study of the technical feasibility, implementation costs, and overall benefits of such portability is needed before we can determine whether this Commission should mandate local number portability. Accordingly, we defer consideration of this issue to a future proceeding.

43. In addition, some commenters request that this Commission address the dialing arrangement decisions traditionally made by state regulatory authorities. Specifically, Ad Hoc suggests we impose a standard, nationally uniform dialing pattern that would use the digit "1" as the toll indicator. Ad Hoc objects to eliminating the digit "1" as a toll call identifier in some states, claiming that such a change would cause substantial customer confusion and potentially reduce competition in the long distance market.[66] Ad Hoc claims that the plan it advocates is also needed to enable end-users to more easily restrict unauthorized toll calls.[67]

44. We recognize the concerns expressed by Ad Hoc regarding the diversity of current dialing arrangements. We note that most, if not all, affected states have already conducted proceedings to consider their particular choice of dialing options. The National Association of Regulatory Utility Commissioners (NARUC) has also endorsed a minimum standard dialing plan.[68] Before we can decide whether or how we should respond to Ad Hoc's request, we need additional information on the specific problems presented by non-uniform dialing arrangements, the problems these arrangements have created or will create in the future, and the specific steps commenters would have this Commission take to remedy those problems. We therefore invite comment in this docket on each of these matters.

III. PHASE TWO OF THE DOCKET

A. Introduction

45. Phase Two of the docket sought comment on the expansion of Feature Group D (FGD) Carrier Identification Codes (CICs) from three digits to four digits. CICs are numeric codes that are widely used within the telephone industry to enable LECs to provide access to long distance carriers, route traffic, identify types of service, bill access purchasers, and for other purposes.[69] Expansion of the current supply of these CICs is important to our nation's continued economic growth because such expansion facilitates increased access to the public switched telephone network by end users as well as by long distance carriers.

46. An access purchaser must have a CIC in order to obtain FGD access, often referred to as "equal" access. Such access allows "1 plus" calls to be routed directly to an access customer's facilities. FGD access has certain features not generally available through other forms of access, in-

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L. Kennedy, counsel for Comcast Cellular Communications; R. Foosaner, Senior Vice-President, Nextel Communications; W. Hartenberger, attorney for Cox Enterprises; Letter from L. Hook, CEO, Time Warner Telecommunications, to K. Levitz (July 29, 1993); Letter from G. Szabo, Vice-President, CellularOne, to P. Wynns, Chief, Industry Analysis Div., Common Carrier Bureau (July 29, 1993).

[60] Commission Requests Comment on Proposed Assignment of the 500 Service Access Code for Personal Communications Services, Public Notice, Mimeo 34306 (released Aug. 5, 1993).

[61] US West offers four definitions of the phrase "local number portability" and notes that even the term "local" is not entirely clear. US West, comments, pp. 1-4. *See also* Bell Canada, comments, p. 5; NYNEX, comments, p. 8; Pacific, comments, p. 13; Pacific, reply comments, p. 5; Southwestern, comments, p. 13; McCaw, comments, p. 19; MCI, reply comments, p. 23.

[62] US West, comments, pp. 1-3.

[63] MFS urges the Commission to require LECs to provide local number portability within a year after a bona fide request unless the LEC can provide clear and convincing justification for not providing such portability. MFS, comments, pp. 8-9. Teleport claims the additional cost of implementing local number portability would be minimal. Teleport, comments, pp. 7-8. US West disagrees with Teleport on additional cost. US West, reply comments, p. 5.

[64] Bell Atlantic, comments, p. 5; BellSouth, comments, p. 16; NPTC, comments, p. 3; NYNEX, comments, p. 8; NYNEX, reply comments, pp. 4-6; Pacific, comments, p. 13; Rochester, comments, p. 4-5; SNET, comments, p. 8; Southwestern, comments, pp. 13-14; Southwestern, reply comments, pp. 6-7; Sprint, comments, pp. 10-11; USTA, comments, p. 14.

[65] CSCN, comments, p. 2; NYNEX, comments, p. 8-9; Southwestern, comments, pp. 13-14; Southwestern, reply comments, pp. 6-7.

[66] Letter from Ad Hoc to the Commission (May 6, 1993)(Ad Hoc Letter). The Ad Hoc Letter requested initiation of a rulemaking proceeding. It was co-signed by California Bankers Clearing House Association; MasterCard International, Inc.; New York Clearing House Association, Securities Industry Association, Consumer Federation of America, County of Los Angeles, Information Technology Association of America, International Communications Association, New York Consumer Protection Board, and Tele-Communications Association.

[67] Ad Hoc, comments, pp. 18-20.

[68] On March 2, 1994, NARUC's Executive Committee adopted a series of resolutions that endorsed establishment of a minimum standard dialing plan of Prefix "1" + Area Code + Central Office Code on a permissive basis, as an "overlay," to existing state dialing plans with the understanding that if this minimum standard dialing plan is not workable in a particular location, the LEC should route the call to an announcement explaining applicable dialing procedures.

[69] The NANP administrator assigns these codes using guidelines developed by the Industry Carriers Compatibility Forum sponsored by the Exchange Carriers Standards Association. *Carrier identification code assignment guidelines*, ICCF 92-0726-002, June 11, 1992.

cluding presubscription[70] and automatic number identification (ANI).[71] Where FGD access is available, callers can use a Carrier Access Code (CAC) to reach long distance carriers by dialing 10XXX (where "XXX" is the long distance carrier's FGD CIC and "10XXX" is the CAC).

47. There are 969 potential three digit FGD CIC numbers, 810 of which had been assigned by the end of 1993. In view of anticipated future demands, the stock of three digit codes available for assignment will likely be exhausted within a year or so.

B. Feature Group D CIC Expansion Plan

48. To increase the number of FGD CICs, a plan was developed to change the format of these codes from three digits to four digits.[72] The change is planned for the first half of 1995. Expanding the length of the CIC codes will require a change in the dialing sequence for CAC codes. CAC codes will change from their current five digit format (10XXX) to a seven digit format (101XXXX).[73] These changes will require dialing extra digits and may be technically difficult and expensive. In light of these factors, the *NOI* raised the question of whether the decision to expand carrier identification codes should be reexamined.

49. Most commenters support the plan to expand FGD CIC codes to 4 digits. Most argue that the plan, adopted in 1988, reflects a broad industry consensus and that much of the work involved in expanding CICs (*e.g.*, conversion or replacement of switches and (other equipment) has already been done.[74] A minority of commenters vigorously dispute the existence of an industry "consensus" and argue that the expansion plan will cause two types of problems. Some are concerned that the expanded CICs will be incompatible with some payphones and private branch exchanges (PBXs) now in use. Such equipment, they contend, would become obsolete if the expanded codes were implemented.[75] In addition, Allnet claims that a lengthened dialing code will increase the difficulties experienced in attracting customers who must dial such codes to use their preferred long distance carrier.[76]

50. We are persuaded by the comments that implementation of the expansion plan should not be delayed. The industry sought alternatives to the expansion of CICs to 4 digits, but concluded that no technical alternative was available.[77] While conservation can delay the date exhaustion occurs, it cannot change the fundamental choice between expansion of the supply of codes and complete exhaustion. After careful review of the record and the ICCF forum process, we tentatively conclude that, in general, the CIC expansion plan is reasonable. It appropriately reflects our policy that access should be provided to all purchasers without discrimination. However, some specification of the transition period appears warranted.

C. The Transition Period

51. Some transition or permissive dialing period is needed during which subscribers can use both 3 and 4 digit FGD CICs, because a "flash cut" conversion of all industry switches and other equipment at the same time is not feasible. Thus, the plan for expansion of the CAC format from 10XXX to the proposed 101XXXX format[78] allows a transition period during which either the old format or the new format can be used.[79] While an industry forum was able to agree on the basics of an expansion program, there has not yet been any consensus on the appropriate length of a permissive dialing period. The NANP administrator therefore selected a transition period of 18 months.[80]

52. LECs generally support the shortest possible transition period.[81] They argue that a shorter period would decrease their switching costs and reduce customer confu-

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[70] In equal access areas, all toll calls leaving the local exchange carrier's service area are automatically routed to the subscriber's preselected or "presubscribed" long distance carrier unless the caller affirmatively selects another carrier (*e.g.*, by dialing a carrier access code or an 800 number).

[71] ANI provides the access purchaser with the telephone number from which a call originates. This is necessary for an IXC to bill the caller without requiring that caller to dial an identification or account number. ANI is a prerequisite for an IXC to offer "1 plus" service. In some but not all areas, LECs make ANI available to IXCs with Feature Group B (FGB) access. AT&T suggests that this Commission might delay exhaustion of FGD CICs by making FGB access service more attractive, for example, by requiring ANI identification on all FGB calls. AT&T, comments, p. 9. While such improvements in FGB might delay somewhat the exhaustion of FGD CICs, as indicated below, such conservation measures do not alter the inevitable choice between expansion and exhaustion.

[72] The plan was adopted by the Industry Carriers Compatibility Forum (ICCF). The ICCF is sponsored by the Carrier Liaison Committee of the Exchange Carriers Standards Association. The most detailed planing document on this issue is *Expansion of Carrier Identification Code Capacity for Feature Group D (FGD)*, Bell Communications Research, Technical Reference TR-NWT-001050, Issue 1, April 1991.

[73] For example, AT&T's CIC would change from 288 to 0288. The prefix dialed to indicate a four digit CIC will be 101. As a result, AT&T's CAC would change from 10288 to 1010288.

[74] Some LECs suggest that costs incurred by price cap carriers to implement four-digit CICs should be eligible for exogenous cost treatment under our price cap rules. *See, e.g.*, Bell Atlantic, comments, p.4; Pacific, comments, pp. 9-10. Because this issue is outside the scope of this proceeding, we decline to interpret or reconsider those rules in this docket.

[75] Intellicall, reply comments, p. 2.

[76] Allnet, comments, p. 8; reply comments pp. 1-3.

[77] The primary technological alternative suggested and rejected was "sectorization" (*i.e.*, the reuse of the same code in different geographic areas). Letter from T. A. Saunders, Vice President, Operations Technology, Bellcore, to R. Firestone, Chief, Common Carrier Bureau (April 10, 1991). If adopted, sectorization would permit several carriers in different sections of the country -- whose service territories did not overlap -- to "share" a single CIC. Regional carriers, however, claim such a plan might impede their future expansion. Also, access providers contend duplication of CICs in different sections would impair access billing. AT&T, comments, p. 8; Ameritech, Phase Two comments, p. 3; BellSouth, comments, p. 20; MCI, reply comments, pp. 2-3; SNET, comments, p 6.

[78] *See* para. 47, *supra*, regarding expansion of CACs.

[79] This is similar to the permissive dialing periods provided for NPA splits which typically last for a year after the split.

[80] Letter from G. Handler, Vice President, Network Planning, Bellcore, to R. Firestone, Chief, Common Carrier Bureau (Oct. 13, 1989).

[81] *See, e.g.*, GTE, comments, p. 22; NYNEX, reply comments, p. 2; Pacific, reply comments, p. 2; Southwestern, comments, p. 10; reply comments pp. 3-4.

sion.[82] In addition, some BOCs contend that an extended transition period would conflict with their obligations under the AT&T consent decree.[83]

53. Most other parties urge adoption of a longer transition period. AT&T, for example, contends that it will take more than six and a half years before all AT&T PBX users have equipment in place that will handle the expanded CICs.[84] Pay telephone providers argue that many independent public payphones are incapable of handling 101XXXX dialing and thus would be made obsolete.[85] IXCs also generally support an extended transition period. MCI and AT&T suggest that the period last for as long as a dozen years[86] and Sprint suggests what may be, in effect, an unending transition period.[87]

54. We tentatively find that lengthening the transition period will significantly reduce – even to the point of virtually eliminating – the hardships imposed on pay phone providers, manufacturers, and PBX users. A longer transition or permissive dialing period will mean that less existing equipment would need to be retired prematurely. Accordingly, we propose to specify a transition period of six years and we seek comment on this proposal.[88]

D. Interstate, IntraLATA Toll Calls

55. Carrier Identification Codes (CICs), as part of Carrier Access Codes (CACs), are sometimes required for customers to obtain access to their preferred interexchange carriers (IXCs). This situation frequently occurs with respect to interstate toll traffic (*i.e.*, MTS traffic) that does not cross a LATA boundary. While customers have been able, through presubscription, to select an IXC of their choice for interLATA "1+" calls, presubscription has not been available for intraLATA "1+" toll calls. As a result, intraLATA toll calls are routinely completed by the LEC rather than turned over to the presubscribed interLATA IXC.[89] This practice generally applies to both interstate and intrastate, intraLATA toll calls.[90]

56. In order for a customer to have an interstate, intraLATA MTS call completed by the IXC that handles the customer's other interstate toll calls, the customer must dial a CAC.[91] Allnet argues that increasing the CAC to seven digits (101XXXX) will increase the difficulty that consumers experience in obtaining access to their preferred IXC and thus increases the discrimination faced by IXCs in competing for intraLATA traffic. Accordingly, Allnet suggests that all current five digit (10XXX) CAC assignments be grandfathered and that expansion of CICs to 4 digits be deferred until "nationwide dial 1 equal access for all intraLATA toll carriers" becomes available at both the intrastate and interstate levels.[92]

57. The LECs' treatment of interstate, intraLATA toll traffic raises a number of questions that we believe require further consideration at this time.[93] For example, the current system may well reduce competition for this traffic and may defeat customer expectations that all of their interstate toll traffic will be carried by their presubscribed IXC. Further, such calls are sometimes carried by a LEC at tariffed rates substantially higher than would have been charged if the call had been turned over to the customer's presubscribed interLATA IXC.[94] Because business customers with high calling volumes may have choices other than "1+" MTS for these toll calls (*e.g.*, least cost routing equipment), such higher rates may be paid disproportionately by residential ratepayers. Thus, it appears that consumer benefits could result from measures to increase competition for this traffic. At the same time, we recognize that the amount of toll traffic involved is relatively small. Moreover, because of the MFJ's interLATA prohibition,[95]

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[82] Southwestern argues, in addition, that the dialing disparity would be a disadvantage for any new carrier and give an unfair advantage to AT&T. Southwestern, reply comments, pp. 2-3.

[83] Pacific Telesis expresses concern that it may be a violation of BOC equal access obligations to provide 10XXX access to AT&T while some of AT&T's competitors could be reached only through 101XXXX. Pacific Telesis, comments, pp. 8-9.

[84] AT&T, reply comments, p. 4.

[85] Intellicall, comments, pp. 4-6. For example, APCC argues that a "12-year transition period would allow payphone owners and other CPE owners to avoid the prohibitive costs involved in prematurely retiring equipment well in advance of the end of its useful life. APCC, reply comments, pp. 6-7.

[86] AT&T, comments, p. 9; MCI, reply comments, pp. 4-6.

[87] Sprint, reply comments, pp. 1-3.

[88] Extension or revision of existing conservation measures may be required in order to ensure an adequate transition period. Thus, we ask Bellcore, the current NANP administrator, to use industry forum procedures to consider any modifications to the *Carrier Identification Code Assignment Guidelines* that will be necessary during the longer transition period.

[89] The LEC process of screening and completing intraLATA MTS calls instead of turning them over to the IXC selected by the customer is sometimes referred to as "stripping."

[90] At least some states have begun consideration of whether they should institute presubscription for intrastate, intraLATA toll calls.

[91] When a 10XXX access code is dialed for an interstate call, the LEC will turn over the call to the long distance carrier. For intrastate calls, the LEC will turn over the call to that carrier if the state has authorized competition for those types of calls. Where a state commission has not authorized competition, an intrastate intraLATA toll call will generally be blocked and the caller will receive an intercept message.

[92] Allnet, comments, p. 8.

[93] Technically, Allnet's concern applies to all intraLATA toll calls, most of which are intrastate and not within our purview. We restrict our attention to that relatively small proportion of toll calling which is both *inter* state and *intra* LATA in nature. We have stated that such traffic is "clearly within our jurisdiction" and required that "full access charges be applied to the origination and termination of interstate, intraLATA services at both ends of a call." Application of Access Charges to the Origination and Termination of Interstate, IntraLATA Services and Corridor Services, Memorandum Opinion and Order (FCC 85-172), released Apr. 12, 1985 (paras. 7 and 9).

We recently decided, in complaint proceedings brought under Section 208 of the Act, 47 U.S.C. §208, that BOC retention of intraLATA traffic absent customer use of a CAC did not constitute unlawful discrimination. *See* Allnet Communication Services, Inc. v. Illinois Bell, et al., 8 FCC Rcd 3030 (1993) and Allnet Communication Services, Inc. v. US West Inc., 8 FCC Rcd 3017 (1993). That complaint proceeding, however, did not address the broader, prospective policy questions concerning interstate, intraLATA toll calling.

[94] For example, a daytime call, handled by Bell Atlantic's Chesapeake and Potomac operating company between Silver Spring, Maryland, and Manassas Virginia (a distance of about 30 miles), is now more expensive than a daytime call from Silver Spring to San Francisco handled by either MCI or AT&T.

[95] The Modification of Final Judgement (MFJ) in the AT&T antitrust case included a condition that the Bell Operating

measures that ensure that interstate, intraLATA "1+" toll traffic is handled by the presubscribed, interLATA IXC could effectively prevent the BOCs from competing for this traffic.[96] It may also conflict with the MFJ assumption that the BOCs would be able to compete for all intraLATA toll traffic.

58. In light of these considerations, we seek comment on whether we should require local exchange carriers to cease screening and completing interstate intraLATA "1+" MTS calls and, instead, deliver those calls to the carrier preselected by the end user unless the preliminary routing numbers indicate otherwise. We invite interested parties to comment on the timing, costs and benefits of steps modifying the current LEC treatment of intraLATA, interstate toll traffic.

IV. PROCEDURAL MATTERS

59. *Regulatory Flexibility Act.* We certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because, if the proposed rule amendments are promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act. While the rules proposed in this proceeding would apply to telecommunications corporations of all sizes that are now assigned telephone numbers or that may in the future seek such assignments, the impact on small business entities served by these corporations and on small telecommunications companies is not likely to be significant. Similarly, our proposed rules on interstate, intraLATA toll traffic are not expected to have a significant impact on small telecommunications companies or other small business entities. The Secretary shall send a copy of this Notice of Proposed Rulemaking, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601, *et seq.* (1981).

60. *Comment Dates.* Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. § 1.415 and 1.419, interested parties may file comments on or before June 7, 1994, and reply comments on or before June 30, 1994. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you should file an original and nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

61. *Ex Parte Rules - Non-restricted Proceeding.* This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally*, 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

V. ORDERING CLAUSES

62. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 201-205, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 201-205, and 403, that NOTICE IS HEREBY GIVEN of the proposed regulatory actions described above and COMMENT IS SOUGHT on these proposals.

63. For further information on this item, contact Peyton Wynns (202) 632-1365 in the Industry Analysis Division of the Common Carrier Bureau.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

Comments on Phases One and Two

The following parties filed comments and/or reply comments on Phase One and/or Phase Two of the Notice of Inquiry released in CC Docket 92-237

A. Initial Comments on Phases One and Two

1. Ad Hoc Telecommunications Users Committee ("Ad Hoc")
2. Aeronautical Radio, Inc., and the Air Transport Association of American ("ARINC/ATA")
3. Allnet Communication Services, Inc. ("Allnet")
4. American Public Communications Council ("APCC")
5. American Personal Communications ("APC")
6. American Telephone and Telegraph Company ("AT&T")
7. Ameritech Operating Companies ("Ameritech")

Companies not complete toll calls that cross LATA boundaries. *See, e.g.*, MFJ Provision II.D.3., *U.S. v. AT&T*, 552 F. Supp. 131, 228 (D.D.C. 1982).

[96] Allnet suggests using a "2-PIC" system, to avoid this, whereby the customer chooses an interLATA presubscribed carrier (as today), and separately chooses an intraLATA presubscribed carrier. Allnet, reply comments, p. 3. Allnet suggests that the intraLATA carrier could either be a choice between the interLATA carrier and the LEC ("modified 2-PIC method") or a completely independent selection ("full 2-PIC method"), for which the chosen interstate intraLATA carrier could be neither the interLATA carrier nor the LEC if the customer so desires. Implementation of such a mechanism would undoubtedly impose additional costs on the BOCs. It is also possible that the treatment of intraLATA toll would best be considered in conjunction with BOC requests for entry into the interLATA market.

8. AMSC Subsidiary Corporation ("AMSC")
9. Bell Atlantic Telephone Operating Companies ("Bell Atlantic")
10. Bell Canada ("Bell Canada")
11. Bell Communications Research Inc. ("Bellcore")
12. BellSouth Corporation ("BellSouth")
13. Canadian Steering Committee on Numbering
14. Cellular Telecommunications Industry
15. Centel Corporation ("Centel")
16. Cincinnati Bell Telephone Company ("CBT")
17. Cox Enterprises, Inc. ("Cox")
18. GTE Service Corporation ("GTE")
19. Illinois Commerce Commission ("Illinois")
20. Information Industry Association ("IIA")
21. Intellicall, Inc. ("Intellicall")
22. McCaw Cellular Communications, Inc. ("McCaw")
23. MCI Telecommunications Corporation ("MCI")
24. Metrocall of Delaware, Inc. ("Metrocall")
25. MFS Communications Company, Inc. ("MFS")
26. National Association of Regulatory Utility Commissioners ("NARUC")
27. North American Telecommunications Association ("NATA")
28. National Cable Television Association ("NCTA")
29. National Telephone Cooperative Association
30. New York Public Service Commission
31. North American Telecommunications Association
32. North Pittsburgh Telephone Company ("NPTC")
33. NYNEX Telephone Companies ("NYNEX")
34. Pacific Telesis Group ("Pacific")
35. Paging Network, Inc. ("PageNet")
36. Rochester Telephone Corporation ("Rochester")
37. Southern New England Telecommunications
38. Southwestern Bell Corporation ("Southwestern")
39 . Sprint Corporation ("Sprint")
40. Telco Planning, Inc. ("Telco")
41. Teleport Communications Group ("Teleport")
42. Telocator, the Personal Communications Industry Association ("Telocator")
43. US West, Inc. ("US West")
44. United States Telephone Association ("USTA")
45. Unitel Communications Inc. ("Unitel")
46. Vanguard Cellular Systems, Inc. ("Vanguard")
47. Whidbey Telephone Company ("Whidbey")

B. Reply Comments on Phases One and Two

1. Ad Hoc
2. Allnet
3. APC
4. APCC
5. AT&T
6. Ameritech
7. Bellcore
8. BellSouth
9. Cox
10. CTIA
11. FleetCall, Inc. ("Fleetcall")
12. GTE
13. Intellicall
14. McCaw
15. MCI
16. MFS
17. NARUC
18. NYNEX
19. Ohio Local Interconnection Exchange Company ("Ohio LINX")
20. Pacific
21. Southwestern
22. Sprint
23. Teleport
24. Telescan ("Telescan")
25. Telocator
26. USTA
27. US West

APPENDIX B

PROPOSALS FOR NUMBERING POLICY BOARD OR SIMILAR POLICY BODIES

1. AT&T WZ1 Numbering Forum

AT&T recommends establishment of a World Zone 1 (WZ1) Numbering Forum that would be open to all and would include a "Policy Development Committee" and a separate "Administration and Implementation Group." AT&T explains that the policy committee would include representatives of both government and industry. The administrative group would be responsible for carrying out policy committee decisions in accordance with guidelines provided by the committee. Issues that could not be resolved by the committee would be subject to Commission's alternate dispute resolution (ADR) procedures. However, if such procedures were not appropriate, this Commission could resolve the matter through its complaint process or other existing procedures. AT&T, comments, p.4-7.

2. Bellcore Steering Committees

In the second edition of its Proposal on the Future of Numbering, Bellcore recommends formation of two NANP steering committees: a WZ1 Steering Committee and a U.S. Numbering Steering Committee. The primary purpose of

these new committees would be to resolve issues that existing forums are unable or unwilling to resolve. In addition, the WZ1 committee would also develop a WZ1-wide funding arrangement to finance administration of the NANP. While the NANP administrator would be directed by consensus of the WZ1 committee, that administrator would have authority, under extenuating or otherwise urgent circumstances, to make decisions regarding the WZ1 use of NANP number resources. Bellcore's proposed U.S. Numbering Steering Committee would be open in both membership and in the conduct of its meetings. As both the Commission and NARUC would be active participants, the committee would function as the leading U.S. telecommunications forum for numbering and would therefore handle project management duties and would address disputes that could not otherwise be resolved. As with the WZ1 committee, the NANP administrator would have the authority in certain cases to make decisions regarding the use of NANP resources in the U.S.

3. BellSouth WZ1 Numbering Forum

BellSouth presents a comprehensive proposal for Commission establishment of a single new WZ1 Numbering Forum (WNF) that would be open to all industry segments and participants. This forum would rely upon the industry consensus process to support its actions and recommendations. Bellsouth explains that a Commission representative would attend WNF meetings but would not vote because the Commission might be called upon to review WNF actions. Initial WNF projects would include plans for the transfer of NANP administration and funding the costs of NANP administration. Bell South, reply comments, pp 1-8

4. Canadian Steering Committee

Unitel suggests the Canadian Steering Committee on Numbering (CSCN) as model for an advisory committee that would guide NANPA. Such a committee would have representatives from industry and users with observers from government and regulatory agencies. Unitel, comments, p. 3. In its comments, the CSCN notes it was established under the auspices of the Canadian Department of Communications and has been given authority to develop strategies and appropriate numbering guidelines and procedures. CSCN, comments, p. 1-2.

5. MCI's NANP Council

While MCI's proposed "NANP Council" would not decide policy, it would facilitate industry consensus through use of the existing committee system and the application of new guidelines and procedures established by the Commission. A separate entity -- which MCI calls the NANP "Registrar" would have the expertise to perform the strictly ministerial functions such as assigning numbers and keeping records of number assignments. MCI, comments, p. 19-22. The NANP Council's subtending committees would develop assignment guidelines, resolve disputed numbering issues, and perform planning functions. Where consensus is reached, the item would be referred to the Commission for publication and approval as appropriate. Where consensus is not reached, other options would be available to the council including procedures for expedited referral to the Commission. MCI, comments, p. 20-21.

6. Metrocall NANP Policy Board

Metrocall urges establishment of an NANP Policy Board that would be self-funded but subject to Commission's authority. Initially, this Board would submit plans to the Commission for a new NANP administrator by a certain deadline. Upon Commission approval of those plans, the Board would then develop contracting guidelines for bidding the administration of NANP. While the administration contract would be for ten years, Metrocall explains that the contract would be awarded through a special auction at which the winner would be the qualified bidder who offered to administer the NANP for the lowest schedule of per number charges. Metrocall claims the administrator's revenues would be high enough to not only to meet its expenses but also to return a profit to the administrator. Metrocall, comments, p. 5-6.

7. Pacific's Number Advisory Council

Pacific's proposed Number Advisory Council would convene a numbering forum to handle numbering issues currently being addressed in other forums, to address various other numbering policy issues, and to assist with the planning function. Pacific's proposed council would not be involved in day-to-day administration but would be available to resolve any complaints which arise. Pacific's proposed council would adopt rules to act on a consensus basis so that no party would be able to veto a majority-decision of the council but the Commission would remain available to hear appeals. Pacific, comments, p. 5-6.

8. Telocator Policy Forum

Telocator, McCaw, and Fleet Call support establishment of an NANP Policy Forum that would be chaired by a member of the Commission staff, operate by consensus, and be self-funded. This forum would be open to representatives from all industry sectors and WZ1 regulatory authorities. Such a council would select a disinterested entity to administer the NANP and would oversee that entity's performance. Telocator, comments, p. 2-3, 7-11; Telocator, reply comments, pp. 5-6; McCaw, comments, p. 4; McCaw, reply comments, p. 5-6; Fleet Call, reply comments, p. 3-4.

Before the
Federal Communications Commission
Washington, D.C. 20554

CORRECTED

PUBLIC NOTICE

Released: April 20, 1994

COMMON CARRIER BUREAU ANNOUNCES RESTRICTED ADJUDICATIVE PROCEEDING REGARDING APPLICATIONS AT 27.5-30.0 GHz (Ka-BAND)

After review, the Common Carrier Bureau has determined that the applications listed below, which request authority to construct and/or operate facilities in various portions of the 27.5-30.0 GHz frequency band, may be mutually exclusive on grounds of electrical interference. The processing of these applications will therefore be considered to be a restricted adjudicative proceeding. *See* 47 C.F.R. § 1.1208(c)(1)(i)(C). Accordingly, *ex parte* presentations will be prohibited with respect to these applications. *See* 47 C.F.R. § 1.1208(a). An *ex parte* presentation is any communication (spoken or written) directed to the merits or outcome of a proceeding made to a Commissioner, a Commissioner's assistant, or other decision-making staff member, that, if written, is not served on other parties to the proceeding or, if oral, is made without an opportunity for all parties to be present.

Copies of these applications, as well as any pleadings or written materials filed with respect to these applications, are available for inspection in the Domestic Facilities Division Public Reference Room, 2025 M Street, N.W., Washington, D.C., Room 6220.

1. 451 previously dismissed applications to construct and operate stations in the Local Multipoint Distribution Service in the 27.5-29.5 GHz frequency band or in various portions of it (petitions for reconsideration or applications for review pending, *see* 47 C.F.R. § 1.1208(a))

2. Motorola Satellite Communications, Inc.: Application to Implement Mobile-Satellite Service Feeder Links in the 29.1-29.3 GHz frequency band

3. TRW, Inc.: Application to Implement Mobile-Satellite Service Feeder Links in the 29.895-29.997 GHz frequency band

4. Hughes Communications Galaxy, Inc: Application to Construct, Launch and Operate a Fixed-Satellite System in the 29.0-30.0 GHz frequency band

5. Norris Satellite Communications, Inc.: Application to Implement Mobile-Satellite Service in the 29.5-30.0 GHz frequency band

6. Teledesic Corporation: Application to Construct, Launch and Operate a Fixed-Satellite System in the 27.6-28.4 GHz and 28.6-29.0 GHz frequency bands

Because there may have been some confusion regarding the relationship of the applications and in order to ensure fairness to all parties, any entity that has made an oral *ex parte* presentation with respect to any of these applications before the issuance of this *Public Notice* should provide, if it has not already done so, an original and one copy of a written memorandum to the Commission's Secretary (with a copy to the Commissioner or staff member involved) that summarizes the presentation. All filings must clearly indicate the application file number or other identifier, the date on which the presentation was made, the fact that the appropriate number of copies have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation.

A list of the names and addresses of all the applicants is attached as an appendix. As noted above, all these parties should be served with any written presentations. We recognize that it may be impractical for any person wishing to make an oral presentation to contact all these parties. Accordingly, any person wishing to make an oral presentation may request that the Commission issue a public notice in advance of the meeting inviting all parties to attend. We also remind applicants that a Negotiated Rulemaking Committee has been proposed pursuant to the Negotiated Rulemaking Act of 1990 to provide recommendations to the Commission to be used in formulating technical rules relating to co-frequency sharing among the local multipoint distribution, fixed satellite and mobile satellite services in the 27.5-29.5 GHz frequency band (LMDS/MSS/FSS 28 GHz Band Negotiated Rulemaking Committee). If the Committee is established, all Committee meetings will be open to the public.

By the Acting Chief, Common Carrier Bureau.

For further information, contact Fern Jarmulnek at (202) 634-1682 or Susan Magnotti at (202) 634-1773.

FEDERAL COMMUNICATIONS COMMISSION

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CHERRY COMMUNICATIONS, Inc. File No. ENF-93-045

ORDER

Adopted: April 15, 1994; Released: May 4, 1994

By the Commission:

1. In January 1993, the Common Carrier Bureau's Enforcement Division initiated an investigation into the marketing practices of Cherry Communications, Inc. (Cherry), following receipt of a large number of informal complaints alleging that Cherry engaged in widespread violations of the Commission's orders and rules concerning conversion of primary interexchange carriers.[1]

2. The Commission entered into consent decree negotiations with counsel for Cherry Communications concerning Cherry's apparent violations and has reached an agreement with Cherry that terminates this investigation. The terms and conditions of the agreement are contained in the attached Consent Decree.

3. We have carefully evaluated the circumstances of this case and find that the public interest would be served by approving this Consent Decree, the terms of which are incorporated in this Order by reference.[2]

4. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act, 47 U.S.C. §154(i), that the Consent Decree, incorporated by reference herein, is hereby ADOPTED.

5. IT IS FURTHER ORDERED that the Acting Secretary SHALL SIGN the Consent Decree on behalf of the Federal Communications Commission.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[1] *See* Policies and Rules Concerning Changing Long Distance Carriers, 7 FCC Rcd 1038 (1992), *recon. denied*, 8 FCC Rcd 3215 (1993); 47 C.F.R. §64.1100 (1992); Investigation of Access and Divestiture Related Tariffs, 101 FCC 2d 911, *recon. denied*, 102 FCC 2d 503 (1985); Investigation of Access and Divestiture Related Tariffs, Phase I, 101 FCC 2d 935 (1985).

[2] The informal complaints that have been filed against Cherry remain pending. However, Cherry has agreed to reimburse consumers for charges that they have incurred as a result of unauthorized conversions. We also note that in recent months the Commission has not received complaints from the public concerning Cherry's marketing practices.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CHERRY COMMUNICATIONS, Inc. File No. ENF-93-045

CONSENT DECREE

1. The Federal Communications Commission (FCC or Commission) and Cherry Communications, Inc. (Cherry) hereby enter into a consent decree terminating an FCC investigation regarding Cherry's alleged violations of the Commission's policies and rules concerning primary interexchange carrier conversions.[1]

2. In January 1993, the Common Carrier Bureau's Enforcement Division initiated an investigation into Cherry's marketing practices after receiving a large volume of consumer complaints alleging that Cherry may have engaged in widespread violations of Commission rules and orders pertaining to primary interexchange carrier (PIC) changes. The investigation, which is independent of the complaints, concerned allegations from consumers in thirty states that Cherry had switched their PICs without authorization (a practice commonly known as "slamming") or had engaged in misleading and deceptive PIC change marketing practices. Activities similar to those alleged in the complaints have been the subject of investigations by various regulatory and enforcement agencies within a number of states. Cherry has represented that as a result of some of these investigations, it has entered into consent decrees or settlements with a number of state agencies providing for operating requirements, reimbursement for investigative costs and attorneys' fees, or both, in lieu of enforcement actions.

3. In addition, Cherry has represented that it has instituted internal remedial measures and has responded to each of the written consumer complaints filed with the Commission with reimbursement of all PIC change charges as well as offers to adjust consumer bills to the rates that would have been charged by the original PICs. Further, it appears that only three complaints received by the Commission allege wrongful activities occurring between April 1, 1993 and December 31, 1993, that resulted in an unauthorized conversion by Cherry.

4. For the purposes of this Consent Decree, the following definitions apply:

(a) "The Commission" means the Federal Communications Commission:

[1] *See* Policies and Rules Concerning Changing Long Distance Carriers, 7 FCC Rcd 1038 (1992), *recon. denied*, 8 FCC Rcd 3215 (1993) (*PIC Change Order);* 47 C.F.R. § 64.1100 (1992); Investigation of Access and Divestiture Related Tariffs, 101 FCC 2d 911, *recon. denied*, 102 FCC 2d 503 (1985); Investigation of Access and Divestiture Related Tariffs, Phase I, 101 FCC 2d 935 (1985).

(b) "Cherry" means Cherry Communications, Inc., successor in interest to Cherry Payment Systems, Inc.;

(c) "Parties" means Cherry and the Commission;

(d) "Order" means an order of the Commission adopting the terms and conditions of this Consent Decree;

(e) "Slamming" means the unauthorized conversion of a customer's interexchange carrier by another interexchange carrier, interexchange resale carrier, or a subcontracted telemarketer;

(f) "PIC Change" is an order transmitted by an interexchange carrier in writing or electronically to a local exchange carrier requesting a change of a customer's primary interexchange carrier (PIC);

(g) "Letter of Authority" or "LOA" means a written authorization signed by the customer authorizing a PIC change;

(h) "Telemarketing" means sales solicitation by telephone;

(i) "Effective Date of this Consent Decree" is the date that the Order is released.

5. Cherry admits the jurisdiction of the Commission over it and over the subject matter of this action for the purposes of this Consent Decree and the Order described in paragraph 4(d) above.

6. The parties agree and acknowledge that this Consent Decree is not dispositive of the rights of the complainants who have filed informal complaints against Cherry and does not resolve those complaints, nor is it dispositive of any matters within the jurisdiction of other federal agencies.

7. The parties further agree that the provisions of this Consent Decree shall be incorporated by reference in the Order described in paragraph 4(d) that formally adopts this Consent Decree and terminates the captioned proceeding.

8. Cherry agrees to waive any rights it may have to seek judicial review or otherwise challenge or contest the validity of the Order described in paragraph 4(d).

9. In consideration for the termination by the Commission of its investigation into the allegations of slamming against Cherry in accordance with the terms of this Consent Decree, Cherry agrees to the following terms, conditions and procedures without admitting any of the alleged violations investigated by the Commission:

(a) Cherry will make a voluntary non-tax-deductible contribution to the United States Treasury, without further protest or recourse, in the amount of $500,000. Cherry shall tender payment in thirty-six (36) sequential monthly installments. The first installment shall be in the amount of $25,000 and shall be tendered within the later of ninety (90) days of the Effective Date of this Consent Decree or, in the event of an appeal or petition for reconsideration by a third party, thirty (30) days after the Order is affirmed, non-appealable, and not subject to modification or revision. The succeeding eleven installments shall be in the amount of $6,818 each. The next 23 installments shall be in the amount of $16,666 each. The last installment shall be in the amount of $16,684. Each of installments number 2 through 36 is due on the first business day of each month, beginning with the first full calendar month following the date that the initial installment is due and payable. Each installment payment must be made by check or money order bearing the file number of this proceeding (ENF-93-045) and drawn to the order of the Federal Communications Commission. Such remittance should be mailed to the Federal Communications Commission, Finance Branch, P.O. Box 73482, Chicago, Illinois 60673-7483.

(b) (1) In the event Cherry defaults on its payment obligations under this Consent Decree,[2] the entire outstanding amount of the voluntary contribution will become immediately due and payable. In the event of a default by Cherry, the Commission shall notify James Elliott, presently Cherry's chairman of the board and controlling shareholder, that for the period of time ending three (3) years from the time of default, he will be proscribed by the Commission from engaging in common carrier activities subject to regulation under Title II of the Communications Act unless, within thirty (30) days of his receipt of such notice, he tenders payment of the entire remaining balance due on the voluntary contribution. For purposes of this subsection, James Elliott will have engaged in common carrier activities subject to regulation under Title II of the Communications Act if he is either (1) an owner of 25% or more of the shares of a regulated common carrier or an officer, director or other official who may exercise direct or indirect control over such carrier, or (2) a general partner or a limited partner owning 25% or more of a partnership that directly or indirectly controls a regulated common carrier.

(2) Cherry also agrees that in the event of any corporate reorganization, including but not limited to merger, acquisition, or change of name, the documents of transfer and/or reorganization shall provide that the new corporate entity shall assume the rights and obligations, both operational and financial, imposed by this Consent Decree.

(c) Cherry will voluntarily withdraw its application for section 214 authority to operate as an international resale carrier (File No. ITC-93-106) within 10 days of the Effective Date of this Consent Decree. Cherry has voluntarily agreed to refile such application no earlier than July 1, 1994, and further, until such date, Cherry shall not apply to the Common Carrier Bureau for any other operating authorization unless such authorization is necessary for Cherry to continue functioning as a domestic resale carrier of interexchange services.

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[2] A default shall occur when Cherry fails to make two consecutive payments as set forth herein; provided, however, that a default shall not occur in the event that Cherry's payments are reduced, eliminated, enjoined, or otherwise modified by or with the approval of a court having jurisdiction over any bankruptcy, insolvency or similar proceeding in which Cherry is the debtor.

(d) For two (2) years from the Effective Date of this Consent Decree or unless and until other Commission-approved methods are utilized (e.g., verifications pursuant to paragraph 9(g), below), Cherry agrees to cause no PIC change orders to be submitted to a local exchange carrier (LEC) until Cherry has first obtained an LOA for each PIC change which satisfies the requirements provided in Section (a) of Appendix B of Policies and Rules Concerning Changing Long Distance Carriers (*PIC Change Order*)[3] and which conspicuously bears the language prescribed in paragraph 9(i) of this Consent Decree. In addition to obtaining an LOA prior to submitting a PIC change order to any LEC, Cherry agrees to perform a second verification on each PIC change. To fulfill the second verification obligation, all LOAs will be individually verified by an agent of Cherry (including in-house verifiers, provided that they are not comprised of Cherry's sales personnel) who will obtain the customer's oral authorization to submit the PIC change order that confirms and includes appropriate verification data (e.g., the customer's date of birth or social security number).

(e) As an additional verification method to be used in conjunction with all PIC change orders initiated by Cherry for two (2) years from the Effective Date of this Consent Decree (specifically including PIC change orders made pursuant to paragraphs 9(d) or 9(g)), Cherry agrees to send each individual whose long distance carrier has been switched to Cherry a letter by first class mail containing at least the following information concerning the requested change: (1) that the information is being sent to confirm an order to change long-distance carriers that was verified by Cherry within the previous 14 business days; (2) the name of the newly requested IXC; and (3) a general description or summary of the material terms, conditions or charges that will apply to the customer's long-distance service.

(f) For the first twelve (12) months following the Effective Date of this Consent Decree, Cherry agrees to use telemarketing (as defined above) only for the following purposes: (1) identifying sales leads and arranging appointments for sales presentations; (2) marketing products and services in conjunction with PIC change orders that fully comply with paragraphs 9(d), 9(e), 9(i), and 9(j); (3) marketing products and services to customers who have already been verified as having signed LOAs; and (4) marketing products and services when the call is initiated by the prospective customer.

(g) For the period beginning twelve (12) months following the Effective Date of this Consent Decree until the end of the two (2) year period prescribed in paragraph 9(d), the Commission authorizes Cherry to use verifications that satisfy the requirements of Section (c) of Appendix B of the PIC Change Order,[4] provided that Cherry complies with the following additional requirements:

(1) Cherry complies with paragraph 9(e), above;

(2) Cherry complies with paragraph 9(h), below; and

(3) Cherry's telemarketers clearly and conspicuously disclose the following information during each telephonic solicitation to switch a customer's long-distance service pursuant to this paragraph:

> (A) that the customer is being asked to agree to switch their long distance service from their current carrier to Cherry;
>
> (B) that Cherry is not affiliated with and is not acting on behalf of any other local or long distance carrier, if such is the case; and
>
> (C) that a fee will be incurred if the customer's long distance service is switched to Cherry.[5]

(h) No sales agent of Cherry Communications shall either imply that the customer's long distance service will remain with the customer's current long distance carrier or that Cherry will only be acting as a billing agent, if that is not the case. In the case of telemarketing subject to paragraph 9(g), above, Cherry's telemarketing employees and its independent verification agents will be required to follow scripts with potential customers that will be provided by Cherry. To the extent allowed by law, Cherry will ensure compliance with this provision by engaging in regular, systematic monitoring of telemarketing at all sites where its telemarketing is conducted.

(i) Cherry agrees to include in all LOAs it acquires under the terms prescribed in paragraph 9(d), above, the following text printed in prominent and clear typeface immediately above the customer's signature line:

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[3] 47 C.F.R. § 64.1100 (1992) (*PIC Change Rules)* (requires interexchange carriers that submit PIC change orders to local exchange carriers to verify the validity of the PIC changes by using one of four confirmation procedures before submitting the change orders to the LECs). 47 C.F.R. § 64.1100(a), as implemented by Appendix B, Section (a), of the *PIC Change Order* prescribes the contents of an LOA: |No PIC change order shall be submitted until| the IXC has obtained the customer's written authorization to submit the order that explains what occurs when a PIC is changed and confirms:

> 1) The customer's billing name and address and each telephone number to be covered by the PIC change order;
>
> 2) The decision to change the PIC to the IXC; and
>
> 3) The customer's understanding of the PIC change fee.

[4] 47 C.F.R. § 64.1100(c) prescribes that:

> |No PIC change order shall be submitted until| an appropriately qualified and independent third party operating in a location physically separate from the telemarketing representative has obtained the customer's oral authorization to submit the PIC change order that confirms and includes appropriate verification data (e.g., the customer's date of birth or social security number).

[5] If applicable, the telemarketer may also disclose that the PIC change fee will be reimbursed by Cherry; provided, however, that such disclosure and the condition for obtaining reimbursement are also clearly stated in the letter required to be sent pursuant to paragraph 9(e).

I understand that by signing this Letter of Agency, Cherry Communications will become my long distance telephone company and that I will no longer be served by my current long distance carrier. I also understand that my local telephone company may charge me a fee to switch my primary long distance carrier to Cherry Communications. At Cherry's option, Cherry may also insert the following statement at the end of the foregoing prescribed language:

Cherry Communications has promised to reimburse such fee if I submit a copy of that bill to them.

(j) Cherry agrees that it will not include any language in LOAs (acquired pursuant to paragraph 9(d), above) that detracts from the clear meaning of the prescribed language in paragraph 9(h), above.

(k) For two (2) years beginning on the Effective Date of this Consent Decree, Cherry agrees to keep a record, subject to Commission inspection, of all unauthorized PIC change complaints submitted in writing directly to Cherry, including those filed against Cherry in any local, state or federal jurisdiction that Cherry has actually received. This record shall include the name, address and telephone number of each complainant, Cherry's response, and the final disposition of each complaint. Inspection by Commission personnel may be made during normal business hours, and Cherry shall be permitted such time as is reasonably necessary to compile the records and obtain such records from its branch offices as may be necessary to satisfy the Commission's inspection request. Inspection may also be made by written request of the Commission for copies of such records. With respect to records copied by or for the Commission pursuant to this paragraph, Cherry reserves the right to claim that such records are non-releasable proprietary information under the Freedom of Information Act, 5 U.S.C. § 552(b) and the Trade Secrets Act, 18 U.S.C. § 1905, and the Commission agrees to allow Cherry an opportunity to establish such claims prior to the release or dissemination of any such material.

(l) Cherry agrees that all customers who allege that Cherry slammed them will, at the minimum, (1) have any and all PIC change fees resulting from the alleged unauthorized conversions refunded to them, and (2) for customers who send re-rating documentation to Cherry, have all calls billed by Cherry re-rated to reflect no more than the lesser of the amount billed by Cherry or the amount that would have been billed by the customer's original PIC.

10. In light of the covenants and representations contained in this Consent Decree, and in express reliance thereon, the Commission agrees to accept this Consent Decree and to issue an Order incorporating this Consent Decree and terminating its investigation in the above-captioned proceeding without any finding of liability on the part of Cherry. This Consent Decree disposes of any possible fines or penalties, including forfeitures, related to the conduct described in paragraph 1, above, for the period of time beginning with Cherry's inception through December 31, 1993. Nothing in this Consent Decree shall prevent the Commission from adjudicating complaints filed against Cherry alleging slamming, or from instituting a new investigation and/or enforcement proceeding against Cherry, including the revocation of Cherry's blanket authority to function as a resale carrier, in the event of future misconduct. If such an enforcement proceeding is initiated, Cherry's earlier conduct may be adduced, but not for the purpose of assessing monetary forfeitures.

11. The parties agree that any violation of the Order incorporating the terms of this Consent Decree shall constitute a separate violation of a Commission Order, entitling the Commission to exercise any rights and remedies attendant to the enforcement of a Commission Order.

12. If the Consent Decree is not signed by the Commission and each of the parties or if the Order deviates from the terms of this Consent Decree, or if either the Order or the Consent Decree are otherwise rendered invalid by any court of competent jurisdiction, the Consent Decree and the Order shall become null and void and may not be used in any fashion in a legal proceeding. The parties agree, however, that except for Cherry's financial rights and obligations herein or except as otherwise ordered by any court of competent jurisdiction, the parties will comply with the operational rights and obligations of this Consent Decree during the pendency of any proceeding initiated by a third party seeking to void, nullify, or otherwise modify this Consent Decree or the Order.

13. The parties further agree that this Consent Decree shall become effective on the date of the release of the Order. The Commission shall notify Cherry of the release by providing Cherry with a copy of the Order.

14. If the Commission brings an action in the United States District Court to enforce the terms of the Order, the parties agree that they will not contest the validity of the Order (unless it has become null and void under paragraph 12), will waive any statutory right to a trial *de novo* and will consent to a judgment enforcing the rights and obligations of the parties as set forth in this Consent Decree.

For the Federal Communications Commission:	For Cherry Communications, Incorporated:
/S/	/S/
William F.Caton	David Giangreco
Acting Secretary	President
April 18, 1994	January 26, 1994
Date	Date

I, James Elliott, in my individual capacity, hereby acknowledge my personal rights and obligations pursuant to the foregoing agreement.

/S/

James Elliott

January 26, 1994

Date

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

Midland Broadcasters, Inc.	File Nos. BR-900131UV BRH-900131UT

For Renewal of Licenses of
Stations KMAJ(AM)/KMAJ-FM
Topeka, Kansas

Omaha Great Empire Broadcasting, Inc.	File Nos. BR-900125UV BRH-900125UW

For Renewal of Licenses of
Stations WOW(AM)/WOW-FM
Omaha, Nebraska

Stauffer Communications, Inc.	File Nos. BR-900201F6 BRH-900201UG

For Renewal of Licenses of
Stations WIBW(AM)/WIBW-FM
Topeka, Kansas

MEMORANDUM OPINION AND ORDER AND NOTICE OF APPARENT LIABILITY

Adopted: April 20, 1994; **Released: April 28, 1994**

By the Commission: Commissioner Quello concurring and issuing a statement.

I. INTRODUCTION

1. The Commission has before it for consideration: (i) license renewal applications for the six captioned radio stations in Kansas and Nebraska:[1] (ii) a Petition to Deny timely filed on May 1, 1990, by State Conferences of Branches of the National Association for the Advancement of Colored People (NAACP) in Kansas and Nebraska[2] and various local NAACP branches against the above renewal applications: (iii) oppositions from the licensees: and (iv) the licensees' responses to staff letters of inquiry. The NAACP alleges that the above stations violated the Commission's equal employment opportunity (EEO) Rule and policies. The NAACP requests that the Commission designate the licensees' renewal applications for hearing and deny the applications.

II. BACKGROUND

2. In challenging an application pursuant to Section 309(d) of the Communications Act, a petitioner must demonstrate party in interest status. In addition, a petitioner must, as a threshold matter, submit "specific allegations of fact sufficient to show... that a grant of the application would be prima facie inconsistent with [the public interest, convenience, and necessity]." 47 U.S.C. Section 309(d)(1); *Astroline Com. Co. Ltd. Partnership v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988) (*Astroline*); *Application of Dubuque T.V. Limited Partnership and Sage Broadcasting Corporation of Dubuque, Iowa for Assignment of Television License for KDUB-TV, Dubuque, Iowa*, 4 FCC Rcd 1999 (1989). The allegations, except for those of which official notice may be taken, must be supported by the affidavit of a person with personal knowledge of the facts alleged. 47 U.S.C. Section 309(d)(1).

3. The licensee of WOW(AM)/WOW-FM, Omaha, Nebraska argues that the NAACP should be classified as an informal objector instead of as a petitioner because no one claiming residence in its service area filed an affidavit in support of the petition to deny. However, a declaration under penalty of perjury from the president of the Omaha, Nebraska branch of the NAACP, who claims to be a listener of WOW(AM)/WOW-FM, was filed on the same day as the petition to deny. We find that the declaration meets the requirements for establishing standing for the NAACP for the Omaha stations. *See American Legal Foundation v. FCC*, 808 F.2d 84 (D.C. Cir. 1987). Therefore, the challenge filed by the NAACP constitutes a valid petition to deny against the two listed stations in Omaha.

4. The licensee of KMAJ(AM)/KMAJ-FM, Topeka, Kansas, argues that the petition against it should be dismissed because the declaration under penalty of perjury filed in support of the petition against KMAJ(AM)/KMAJ-FM was filed late and failed to allege personal knowledge of its case. The licensee of WIBW(AM)/WIBW-FM, Topeka, Kansas, argues that the NAACP cannot be classified as a petitioner, but can be considered an informal objector because the petition failed to include a supporting affidavit from someone claiming residence in its service area. We note that, while the petition was timely filed on May 1, 1991, the declaration under penalty of perjury submitted by the NAACP in support of its challenges against the Topeka stations was filed in a supplement on May 23, 1991 -- three weeks after the deadline. The NAACP states that the declaration, which was from the Topeka NAACP branch president, was filed late because the Topeka branch of the NAACP needed time to review its files and consider the EEO performance of the Topeka stations. It argues that the Commission should consider the declaration since it was filed prior to the deadline for oppositions to the petition and no party would be harmed. In addition, the president of the Topeka branch did not claim to live in the service areas of any of the four stations petitioned in Topeka or to listen to any of the Topeka stations.

5. The Commission has previously ruled that these same arguments in support of untimely filings did not constitute good cause for the untimeliness. *See Applications of Certain Broadcast Stations Serving Communities in the States of*

[1] The call signs for KMAJ(AM)/KMAJ-FM were KEWI(AM)/KMAJ(FM) at the time the petition to deny was filed.

[2] The NAACP challenged the renewal applications of 11 radio stations in Kansas, Nebraska and Oklahoma. This *Order* addresses the renewal applications of six of those stations. The applications of the remaining stations will be the subject of separate orders.

Michigan and Ohio, 3 FCC Rcd 6944, 6944 (1988) (citing *Florida Broadcast Renewals*, 3 FCC Rcd 1923 (1988)). Accordingly, we will treat the NAACP as an informal objector against the four Topeka stations because the declaration was untimely filed without justifiable cause and fails to show that the challenger is a listener or resident within the station's service area. 47 C.F.R. Section 73.3584(b); *see also Application of KDEN Broadcasting Co. for Renewal of License of Station KDEN, Denver, Colorado*, 55 Rad. Reg. 2d (P&F) 1311, 1311-1312 (1984).

III. PLEADINGS

6. The NAACP derived its factual allegations from the licensees' EEO programs and annual employment reports. Review of their allegations led us to conclude that the NAACP presented a prima facie case demonstrating that, as to all six stations, unconditional grant of the renewal applications would have been inconsistent with the public interest.[3] Section 309(d)(1) of the Communications Act, 47 U.S.C. Section 309(d)(1). *Astroline, supra.* Further inquiry was, therefore, necessary. *See Beaumont Branch of the NAACP and the National Black Media Coalition v. FCC*, 854 F.2d 501, 506 (D.C. Cir. 1988) (*Beaumont); Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621 (D.C. Cir. 1978) (*Bilingual*).

7. Review of the NAACP's allegations and supporting documentation as well as each licensee's renewal applications, oppositions and inquiry responses leads us to conclude that there are no substantial and material questions of fact warranting designation for hearing. In addition, we find no evidence that any licensee engaged in discrimination. Thus, grant of each application will serve the public interest. 47 U.S.C. Section 309(d)(2). *Astroline, supra.* Accordingly, we will grant renewal but with remedies and sanctions as noted, *infra.*

IV. DISCUSSION

8. Section 73.2080 of the Commission's Rules requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. When evaluating EEO performance, the Commission focuses on the licensee's efforts to recruit, employ and promote qualified women and minorities and the licensee's ongoing assessment of its EEO efforts. Such an assessment enables the licensee to take corrective action if qualified women and minorities are not present in the applicant pool. The Commission also focuses on any evidence of discrimination by the licensee. See Sections 73.2080 (b) and (c) of the Commission's Rules, 47 C.F.R. Sections 73.2080 (b) and (c).

9. When a renewal application indicates an absence of discrimination and a record of adequate EEO efforts, the application is granted, if otherwise appropriate. When it fails to evidence a record of adequate EEO efforts, the Commission may impose a variety of sanctions or remedies, such as reporting conditions, renewal for less than a full term, forfeiture, or a combination thereof. Further, the Commission will designate the application for hearing if the facts so warrant. *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987) (hereinafter *Broadcast EEO), petition for reconsideration pending; see also* 4 FCC Rcd 1715 (1989) (request for clarification by National Association of Broadcasters) (hereinafter *Clarification of Broadcast EEO). See e.g., Beaumont, supra; Bilingual, supra.*

KMAJ(AM)/KMAJ-FM, Topeka, Kansas[4]

10. A review of the licensee's 1990 EEO Program Report, response to the petition to deny and response to our letter of inquiry reveals that KMAJ(AM)/KMAJ-FM had 11 overall (9 upper-level) full-time hiring opportunities from July 28, 1987, through June 1, 1990. The licensee used the following general recruitment sources for all 11 openings and reported minority referrals as follows: *Topeka Capital-Journal* (3), Topeka Job Service Council (1), Washburn University (0), Everywoman's Resource Center (0) and employee referrals (2). It did not report minority referrals from any other sources. However, it contacted the Topeka Job Security Center for 11 openings and, starting near the end of the term in May 1990, used the following general sources: American Career College Placement Service, Kansas University, Kansas State University, various employment agencies and Topeka Technical College. It used the Coordinating Committee of Black Community, a minority source, for all openings, and used El Centro Servicios Para Hispanics, The League of United Latin American Citizens and the NAACP, all additional minority sources, for recruitment starting in May 1990.

11. The licensee reported complete applicant flow data for only one of the 11 positions filled. It received 36 applications and interviewed 22 applicants (no minorities) for that position. Of the 11 hires, none were minorities.[5] All hires resulted from referrals from the *Topeka Capital-Journal.* The licensee explained that its recruitment records are incomplete because the employee responsible for main-

[3] The licensees were not challenged regarding their recruitment of women. Nonetheless, as is our practice in all cases, we reviewed each licensee's EEO efforts in this respect and found them to be sufficient except for those of WIBW(AM)/WIBW-FM, as is explained herein.

[4] The license term for all six stations in the instant case ended May 31, 1990.

[5] The labor force of the Topeka, Kansas MSA is 45.5% female and 11.2% minority (6.4% Black, 3.5% Hispanic, 0.5% Asian-Pacific Islander, and 0.8% American Indian). The licensee's Annual Employment Report for 1984 is missing from station and Commission files. The 1985 report indicates that the licensee employed 25 employees overall (23 upper-level) of whom one was a minority, a Black upper-level employee (4.0% of overall employees, 4.4% of upper-level). In 1986, the licensee employed 26 employees overall (24 upper-level) of whom two (7.7%) were minorities. One was a Black upper-level employee (4.2% of upper-level employees) and one was an Hispanic lower-level employee (3.9% of overall employees). From 1987 through 1989, the licensee's only minority employee was an Hispanic employee in a lower-level position, comprising 4.4% to 4.6% of overall employees. In 1987, the licensee employed 23 employees overall (20 upper-level). In 1988, the licensee employed 22 employees overall (20 upper-level). In 1989, the licensee employed 22 employees overall (19 upper-level). In 1990, the licensee employed no minorities among its 28 employees overall (26 upper-level).

taining the records destroyed them as part of an apparent plan to destroy evidence of his activities at the stations. The employee was terminated on March 6, 1990, immediately after admitting that he embezzled station funds, a crime for which he was later convicted.

12. The NAACP asserts that the licensee's recruitment sources include only one minority organization and that all sources combined produced few minority referrals. It criticizes the licensee for employing what it terms as a "token" number of minorities during the license term and asserts that the licensee has no plans to implement a meaningful EEO program.

13. The licensee asserts that it has recruited minorities through a variety of sources, including minority sources, for every opening during the license term. Although the licensee has not employed any Black employees full-time since 1986, it states that it employed a Black part-time announcer from November 30, 1989, to June 7, 1990, and offered to change her position to full-time. She declined the offer because of her other job, which later transferred her to another state. The licensee acknowledged that it has had difficulty attracting Black applicants but denies the NAACP's assertion that it does not intend to implement a meaningful EEO program. In October 1989, the licensee joined with other Topeka stations to sponsor a broadcast seminar for minorities and females held at Washburn University which attracted 17 people, including eight minorities, to consider broadcasting careers. The licensee plans to make this an annual event. In addition, in May 1990, the licensee added three minority and four general sources as well as several employment agencies to its list of sources to contact for openings.

14. After reviewing the record, we find no substantial and material question of fact sufficient to warrant a hearing. *See Astroline, supra.* In addition, we find no evidence indicating that the licensee engaged in discrimination.

15. However, the licensee's efforts to recruit minorities were deficient because it failed to recruit so as to attract an adequate pool of minority applicants for at least 66% (seven) of its 11 full-time positions. Although applicant/interview pool data were missing, the licensee admitted that it received few minority referrals or applicants. Notwithstanding the absence of minorities from the applicant and interview pools as noted above, it does not appear that the licensee consistently engaged in efforts to attract minorities or otherwise conducted meaningful self-assessment of its program. In this regard, the licensee used one minority source for all vacancies and it was unproductive. Also, it obtained only six minority referrals and failed to modify its program until one month before the license term expired. Accordingly, a base forfeiture of $12,500 and reporting conditions are warranted. *See Policy Statement,* FCC 94-27 (Released February 1, 1994).

16. Furthermore, the licensee's failure to recruit so as to attract an adequate pool of minority applicants for at least 33% of the overall and upper-level full-time positions renders its EEO efforts egregiously deficient warranting an upward forfeiture adjustment of $6,250. *See Policy Statement, supra.* In light of the above, we will issue a Notice of Apparent Liability for $18,750 and renew the licenses subject to reporting conditions.

WOW(AM)/WOW-FM, Omaha, Nebraska

17. A review of the licensee's 1990 EEO Program Report, opposition and responses to our letters of inquiry reveals that the licensee had 53 overall and 41 upper-level full-time hiring opportunities from March 31, 1986, through May 31, 1990. The licensee was able to provide recruitment data for only 25 of its 53 full-time hires. The data reveal that it recruited from multiple sources for 23 openings and that it received minority referrals from general sources as follows: *Omaha World Herald* (3), Nebraska Job Service (3), and employee referrals (1). It also contacted 14 general and female-specific sources for 10 or more openings and five general sources for six or fewer openings, but received no minority referrals.[6] The licensee contacted the *Omaha World Herald* for 20 openings, the Nebraska Job Service for 23 openings, and the Iowa Job Service for 19 openings. The Urban League, the only minority source to produce referrals, was contacted for 21 openings and made three minority referrals. The licensee also contacted the *Omaha Star,* a Black newspaper, for 18 openings and seven minority sources for 10 openings.[7] The interview records that the licensee did maintain reveal that it interviewed at least 117 applicants, at least 12 of whom (10.3%) were minorities (eight Blacks, three American Indians and one Hispanic).[8] The available information on applicant/ interview pools reveal that minorities were present in nine pools (two upper-level). The referral source of one Black interviewee is unknown by the licensee. Two of its 53 hires were minorities -- a Black clerical employee and an Hispanic sales worker. The Hispanic hired was a

[6] Sources contacted included five colleges and/or college organizations, six job services and human relations departments, the Urban Housing Foundation, YWCA, City Recreation in Omaha, United Ministries of Northeast Omaha, National Association of Broadcasters, American Women in Radio and Television, Nebraska Broadcasters Association; ads on its stations, *Radio & Records, Supermarket News* and KGOR radio.

[7] Minority sources included the Omaha OIC, Hispanic Student Organization at the University of Nebraska, Chicano Awareness Center, National Black Media Coalition, National Council of Negro Women, Black Employees Association and the Omaha Association of Black Journalists.

[8] The labor force for the Omaha, Nebraska MSA is 44.6% female and 8.6% minority (5.9% Black, 1.8% Hispanic, 0.6% Asian-Pacific Islander, and 0.3% American Indian). The licensee's Annual Employment Reports for 1984-86 reveal that the licensee employed from 38 to 40 employees, 35 to 36 of whom were in upper-level positions. During this period, the licensee employed one minority, a Black employee in a lower-level position, comprising 2.5% to 2.6% of the employees. The licensee reported that it employed an Hispanic sales worker starting in August 1986 who was "inadvertently omitted" from Annual Employment Reports in 1987 and 1988. In 1987, according to the corrected information, the licensee employed 39 employees (33 upper-level), of whom two (5.1%) were minorities, an Hispanic upper-level employee (3.0%) and a Black lower-level employee (2.6%). In 1988, the licensee employed 40 employees (35 upper-level), of whom two (5.0%) were the same minorities reported in 1987. In 1989, the licensee employed 40 employees (34 upper-level), of whom one was a minority, an Hispanic in an upper-level position (2.5% of overall and 2.9% of upper-level employees). In 1990, the licensee employed 36 employees (31 upper-level), of whom one was a minority, an Hispanic in an upper-level position (2.8% of overall and 3.2% of upper-level employees).

former employee of the station. In addition, the licensee offered full-time jobs in its traffic department to two Black applicants who declined the offers.

18. The NAACP asserts that the licensee hired so few minorities from its minority referrals that it discriminated against minorities. It notes that the licensee reported receiving 10 minority referrals in the renewal year for full- and part-time openings and only hired one minority for a full-time position. In addition, the NAACP asserts that the EEO record of the stations became "abysmal" as soon as the licensee took control of the stations after the 1983 reporting year. Finally, the NAACP criticized the licensee for employing no minorities on a part-time basis.

19. In defense of its record, the licensee denies that it has discriminated, noting that it has recruited from a number of general and minority sources for most openings as well as self-assessed its EEO program. The licensee states that its self-assessment has included meetings in June 1987 with a top official of the state EEO Commission, and with the head of the Omaha Urban League in July 1989 as well as a subsequent meeting with an Urban League recruiter to encourage more referrals. Furthermore, following self-assessment in September 1989, the licensee states that it created the position of EEO Compliance Officer and added 16 new general and seven new minority sources to its contact list used for most openings. The licensee states that it has engaged in self-assessment and taken steps to improve its EEO efforts because it is aware that it has not received large numbers of minority referrals. It notes, however, that it has had minority referrals, applicants, interviewees and hires. As to the NAACP's argument that the station's EEO performance suffered after the licensee assumed control, the licensee asserts that the allegation is without merit because it is based solely on the loss of one minority employee after 1983. Finally, as to the NAACP's charge of not employing Black part-time employees, the licensee notes that it employed three Blacks in part-time jobs during the term, including one Black announcer starting in 1986.

20. In view of the foregoing, we find no substantial and material question of fact warranting a hearing. *See Astroline, supra.* We find no evidence indicating that the licensee engaged in discrimination. In this regard, we note that the licensee received some minority referrals and applicants, and interviewed and hired minorities during the license term.

21. However, the licensee's efforts to recruit minorities were deficient because it failed to recruit so as to attract an adequate pool of minority applicants for at least 66% (35) of its 53 full-time positions. Only 17% (nine) of the 53 overall applicant/interview pools and 5% (two) of the 41 upper-level applicant/interview pools contained minorities. Notwithstanding the absence of minorities from the applicant and interview pools as noted above, it does not appear that the licensee consistently engaged in efforts to attract minorities or otherwise conducted meaningful self-assessment of its program. In this regard, the licensee failed to use minority sources for 32 vacancies. Accordingly, a base forfeiture of $12,500 and reporting conditions are warranted. *See Policy Statement, supra.*

22. Further, the licensee's failure to recruit so as to attract an adequate pool of minority applicants for at least 33% of the overall and upper-level full-time positions renders its EEO efforts egregiously deficient warranting an upward forfeiture adjustment of $6,250. Similarly, the combination of the above and and its large number of hiring opportunities (53) warrants a further $6,250 upward adjustment, for a total forfeiture of $25,000. Given the number and types of deficiencies noted, a short term renewal is also warranted. *See Policy Statement, supra.* In light of the above, we will issue a Notice of Apparent Liability for $25,000, renew the licenses for a short term, and impose reporting conditions.

WIBW(AM)/WIBW-FM, Topeka, Kansas

23. A review of the licensee's 1990 EEO Program Report, opposition and responses to our letters of inquiry reveals that the licensee had 22 overall full-time hiring opportunities, 21 for upper-level positions, from February 1, 1986, through May 31, 1990. The licensee reported that it used general recruitment sources from which it received minority referrals as follows: *Topeka Capital Journal* (4), Radio and Television News Directors Association Newsletter (2), referrals from community members (2) and *Radio & Records* (1). The licensee reported using the following general sources, for seven to 12 openings, from which it received no minority referrals: Voluntary Action Center, Kansas Association of Broadcasters, Everywoman's Resource Center, three job services, Kansas University and employee referrals. It used the *Topeka Capital-Journal* for eight openings. It used the following sources for one to six openings, from which it received no minority referrals: Nine universities and colleges, Topeka Department of Parks and Recreation and the National Association of Farm Broadcasters.

24. The licensee contacted the following minority sources for 12 openings: Shawnee County Indian Center, Coordinating Committee for the Black Community, NAACP and El Centrol De Servicios. None of the minority sources produced minority referrals. Minorities were present in applicant pools for five of the 22 openings (four upper-level). Also, minorities were present in four interview pools (three upper-level). The licensee recruited for 13 of its 22 full-time openings. One of the positions not publicly recruited for was filled by a Black applicant who was personally recruited for that job. It interviewed 76 applicants, of whom at least four (5.3%) were minorities: three were Black, but the race of the fourth minority interviewee is unknown. The licensee's only minority hire was the Black applicant personally recruited for an upper-level position (4.8%).

25. The Everywoman's Resource Center was the only female-specific source used by the licensee, and this source produced no female referrals or applicants. However, the licensee received 31 female referrals from the *Topeka Capital-Journal* and seven from five other general sources. The records indicate that, although the licensee had 22 hiring opportunities, the 38 female applicants were considered in only eight (36%) of the applicant/interview pools for overall full-time positions, and only seven (33%) of the applicant/interview pools for upper-four full-time positions. Moreover, while the licensee interviewed 34 female applicants for these eight vacancies, 24 of these female applicants (71%) were interviewed for only two of the eight positions. In particular, the licensee interviewed 17 women for one secretarial vacancy, and seven women for one sales worker vacancy. The remaining 10 female applicants were interviewed for only six additional jobs. We note further that, for five of the seven license term years, women were

employed below 50% of parity at various levels in the station's upper-level staff.[9] The licensee hired six women overall, five for upper-level positions.

26. The NAACP asserts that the licensee's minority recruitment efforts produced few referrals and that the licensee failed to recruit for some openings. It also asserts that the licensee appears to have contacted Black organizations only toward the end of the license term. It criticizes the licensee for failing to hire any minorities for upper-level jobs in the renewal year and for only employing a "token" number of minority employees during the term.

27. The licensee concedes that it did not recruit for every opening but notes that three openings for which no recruitment took place were filled by interns hired full-time after graduation.[10] Next, the licensee states that the NAACP incorrectly concludes that it only contacted minority sources at the end of the term. The licensee states that it contacted minority sources during the entire period under review and expected them to be productive because of success with referrals for its television station in the same market, WIBW-TV. It notes, however, that the minority sources were not productive for the radio stations during their license terms. Moreover, it states that it had difficulty contacting the local NAACP office at the end of the term. As part of the self assessment of its referral record, the licensee states that it sought minority and female applicants through a broadcast seminar for females and minorities held at Washburn University in October 1989 as well as through recruitment for specific jobs. Acknowledging that it hired only one minority full-time, the licensee hired four Blacks for part-time positions. Although the licensee was not challenged regarding its recruitment of women, it states that its EEO program has been "highly effective" in the hiring of women.

28. On the basis of the record before us, we find no substantial and material question of fact warranting a hearing. *See Astroline, supra.* We find no evidence indicating that the licensee engaged in discrimination and note that the licensee did interview and hire minorities and women during the license term.

29. However, the licensee's efforts to recruit minorities were deficient because it failed to recruit so as to attract an adequate pool of minority applicants for at least 66% (15 jobs) of its 22 full-time positions. Only 23% (five) of the 22 overall applicant pools and 19% (four) of the 21 upper-level applicant pools contained minorities. Only 18% (four) of the 22 overall interview pools and 14% (three) of the 21 upper-level interview pools contained minorities. Notwithstanding the absence of minorities from the applicant and interview pools as noted above, it does not appear that the licensee consistently engaged in efforts to attract minorities or otherwise conducted meaningful self-assessment of its program. In this regard, the licensee failed to recruit for nine of 22 vacancies. In addition, it failed to use minority sources for 10 vacancies. Accordingly, a base forfeiture of $12,500 and reporting conditions are warranted. *See Policy Statement, supra.* Further, the licensee's failure to recruit so as to attract an adequate pool of minority applicants for at least 33% of the overall and upper-level full-time positions renders its EEO efforts egregiously deficient warranting an upward forfeiture adjustment of $6,250.

30. Moreover, the licensee's efforts to recruit women were deficient because it failed to recruit so as to attract an adequate pool of female applicants for at least 66% (15 jobs) of its 22 full-time positions. Women were in only 36% (eight) of the 22 overall applicant and interview pools and 33% (seven) of the 21 upper-level applicant and interview pools. Notwithstanding the absence of women from the applicant and interview pools as noted above, it does not appear that the licensee consistently engaged in efforts to attract women or otherwise conducted meaningful self-assessment of its program. Again, as noted above, the licensee failed to recruit for nine of 22 vacancies, attracted 71% of its female interviewees to only two positions (half [17] to a secretarial vacancy and seven others to a sales worker vacancy). Despite the absence of women from most of its interview pools, it used only one (unproductive) female-specific recruitment source. The combination of the licensee's failure to engage in adequate recruitment efforts for minorities and women warrants a further $11,250 upward adjustment, for a total forfeiture of $30,000. Given the number and types of deficiencies noted, a short term renewal is also warranted. See *Policy Statement, supra.* In light of the above, we will issue a Notice of Apparent Liability for $30,000, renew the licenses for a short term, and impose reporting conditions.

V. CONCLUSION

31. After considering the evidence and arguments submitted by the NAACP and all licensees in the instant case, we find that hearings are not warranted and the records of the licensees support the granting of their renewal applications. Because of concerns about future affirmative action

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[9] *See infra* note 5 for the labor force statistics for the Topeka MSA. The licensee's Annual Employment Reports reveal that, in 1984, the licensee employed 38 employees, 32 upper-level, including a Black upper-level employee (3.1%). Also, it employed eight women (21.1%), two of whom (6.3%) were in upper-level positions. In 1985, the licensee employed 39 employees, 31 upper-level, and no minorities. It employed 12 women (30.8%) overall, five (16.1%) of whom were in upper-level positions. In 1986, the licensee employed 44 employees, 38 upper-level, including a Black upper-level employee (2.6%). It employed 13 women (29.6%) overall, eight (21.1%) in upper-level positions. In 1987, the licensee employed 42 employees, 36 upper-level, of whom one was a Black in an upper-level position (2.8%). It employed 16 women (38.1%) overall, 11 (30.6%) of whom were in upper-level positions. From 1988 to 1989, it employed 35 and 32 employees overall, respectively, and 31 and 28 employees, respectively, in upper-level positions but no minority employees. In 1988, it employed 10 women (28.6%) overall, seven (22.6%) upper-level, and in 1989, it employed eight women (25.0%) overall, five (17.9%) of whom were in upper-level positions. In 1990, the licensee hired a Black applicant for an upper-level position after the Annual Employment Report was filed but before the end of the term. The licensee employed 40 employees in 1990, 36 upper-level, of whom one was the minority hired at the end of the term, comprising 2.5% of overall employees and 2.8% of upper-level employees. It employed eight women (20.5%) overall, four (11.4%) of whom were in upper-level positions.

[10] The other positions for which no recruitment took place were filled by referrals from officers of the licensee (3), another station (1), the local parks department (1) and the Black male previously mentioned who was personally recruited by the licensee.

efforts, we will impose reporting conditions on each of the stations. In addition, for violations of the Commission's EEO Rule, we will issue a Notice of Apparent Liability for $18,750 to the licensee of KMAJ(AM)/KMAJ-FM. We will also issue Notices of Apparent Liability for $25,000 to the licensee of WOW(AM)/WOW-FM and $30,000 to the licensee of WIBW(AM)/WIBW-FM for violations of the EEO Rule and renew their licenses for a short term.

VI. ORDERING CLAUSES

32. Accordingly, IT IS ORDERED that the Petition to Deny filed by the NAACP against the licensee of WOW(AM)/WOW-FM IS DENIED.

33. IT IS FURTHER ORDERED that the informal objection filed by the NAACP against the licensees of KMAJ(AM)/KMAJ-FM and WIBW(AM)/WIBW-FM IS DENIED.

34. IT IS FURTHER ORDERED that, the license renewal applications filed by Midland Broadcasters, Inc. for Stations KMAJ(AM)/KMAJ-FM ARE GRANTED subject to the EEO reporting conditions specified herein.

35. IT IS FURTHER ORDERED that the license renewal applications filed by Omaha Great Empire Broadcasting, Inc. for Stations WOW(AM)/WOW-FM ARE GRANTED FOR A SHORT TERM ending June 1, 1995, subject to reporting conditions as described herein and, pursuant to Section 503 of the Communications Act of 1934, as amended, 47 U.S.C. Section 503, a NOTICE OF APPARENT LIABILITY FOR FORFEITURE in the amount of $25,000.

36. IT IS FURTHER ORDERED that the license renewal applications filed by Stauffer Communications, Inc. for Stations WIBW(AM)/WIBW-FM ARE GRANTED FOR A SHORT TERM ending June 1, 1995, subject to reporting conditions as described herein and, pursuant to Section 503 of the Communications Act of 1934, as amended, 47 U.S.C. Section 503, a NOTICE OF APPARENT LIABILITY FOR FORFEITURE in the amount of $30,000.

37. IT IS FURTHER ORDERED that, pursuant to Section 503 of the Communications Act of 1934, as amended, 47 U.S.C. Section 503, this document constitutes a NOTICE OF APPARENT LIABILITY FOR FORFEITURE in the amount of $18,750 for the licensee of KMAJ(AM)/KMAJ-FM.

38. IT IS FURTHER ORDERED that the licensees of Stations WOW(AM)/WOW-FM and WIBW(AM)/WIBW-FM file an original and one copy of the following information on February 1, 1995, and the licensee of Stations KMAJ(AM)/KMAJ-FM file an original and one copy of the following information on February 1, 1995, February 1, 1996, and February 1, 1997:

(a) For each report, please make two lists divided by full-time and part-time job vacancies during the twelve months preceding the respective reporting dates, indicating the job title, date of hire, the race or national origin, sex and the referral source of each applicant for each job and the race or national origin and sex of the person hired. The list should also note which recruitment sources were contacted;[11]

(b) a list of employees as of the January 1, 1995, payroll period for the first report[12] and as of the January 1, 1996, and the January 1, 1997, payroll periods for the second and third reports, by job title, indicating part-time or full-time status (ranked from the highest paid classification), date of hire, sex and race or national origin;

(c) details concerning the station's efforts to recruit minorities for each position filled during the period specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment. In addition, the licensee may submit any relevant information with regard to the station's EEO performance and efforts thereunder.

39. IT IS FURTHER ORDERED, that the Mass Media Bureau send by Certified Mail -- Return Receipt Requested -- one copy of this Memorandum Opinion and Order and Notice of Apparent Liability to all parties.

40. The reports are to be filed with the Secretary of the Commission for the attention of the Mass Media Bureau's EEO Branch. Should the parties have any questions regarding this action, they may telephone the Mass Media Bureau's EEO Branch at 202-632-7069. Regarding the forfeiture proceedings, the licensees may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this Memorandum Opinion and Order and Notice of Apparent Liability. Any comments relating to their ability to pay should include those financial letters set forth in the noted attachment.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[11] Such a list might start: (1) News Director: Officials and Managers; Full-time.

3 Applicants:	1 White female	A.W.R.T.
	1 Black male	Urban League
	1 Black female	NAACP

Sources Contacted: Local Newspaper, A.W.R.T., Urban League and NAACP.

Selected: Black male (12/19/94).

[12] The licensees of WOW(AM)/WOW-FM and WIBW(AM)/WIBW-FM should provide a list of employees as of the January 1, 1995, payroll period for their reports due February 1, 1995. They are not required to file second or third reports.

Concurring Statement of Commissioner James H. Quello

In Re Applications of Midland Broadcasters, Inc. et al.; Lotus Communications, Inc. and University of Southern California; Sun Mountain Broadcasting, Inc.; Commonwealth Broadcasting of Northern California et al.; Buckley Broadcasting Corp. et al.

With some consternation, I face yet again a series of Commission decisions designed to pit Big Brother against industry. With extreme reluctance, I concur in these items, recognizing that, for the most part, a sanction of some sort may be necessary in these cases due to the licensees' failure to comply with our equal employment opportunity rules. Most of these sanctions are against licensees in medium to large markets, where the resources to comply with our EEO rules are, presumably, more readily available than in small markets. In addition, several of the remiss licensees in these cases are located in markets with some of the highest concentrations of minorities in the country, thus providing further justification for sanctions.

Nonetheless, the severity of the sanctions in these cases compel me, yet again, to beseech my colleagues at the Commission to change their focus in ensuring compliance with these very important policies. Compliance could be encouraged -- I think more effectively than by means of harsh punishment -- through use of a "three strikes and you're out" policy. The first violation of our EEO or other rules (except for rules involving safety or intentional rule violations) would result in a warning and imposition of reporting conditions; a second violation would result in a fine and a short-term renewal; a third violation would result in a large fine or designation for hearing.

Another option to encourage, rather than painfully extract, compliance would be to allow broadcasters, as we currently allow common carriers, to settle cases where justified, entering into a consent decree with the Commission that is mutually beneficial to all the parties involved. The Commission would benefit from conserving resources, broadcasters would benefit from gaining prompt disposition of their applications, and minorities would benefit from the funds collected through consent decrees. In the consent decree or other context, I again urge that the Commission use monies collected through enforcement of EEO rules (and other rules as well) for constructive, positive, and practical affirmative purposes. Such purposes could include the funding of programs for educating and training minorities for careers in media, or for funding minority ownership of media properties.

I know that, right now, I am one of the few, but growing, voices for reform of our stepped-up enforcement scheme. But I will continue to be a voice -- persistent, balanced, and increasingly vocal -- supporting an innovative approach to ensuring equal opportunities for minorities. I remain convinced that the best way of ensuring equal opportunities is by working with, rather than against, the very industry that must provide these opportunities.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

Buckley Broadcasting Corporation — File Nos. BR-910131VO, BRH-910131WL

For Renewal of Licenses of
Stations WSEN(AM)/WSEN-FM
Baldwinsville, New York

Buckley-WOR Broadcasting Corporation — File No. BR-910131WD

For Renewal of License of
Station WOR(AM)
New York, New York

Interstate Broadcasting Company, Inc. — File Nos. BR-910131WR, BRH-910131WI

For Renewal of Licenses of
Stations WQXR(AM)/WQXR-FM
New York, New York[1]

Group W Radio, Inc. — File No. BR-910201XK

For Renewal of License of
Station WINS(AM)
New York, New York

MEMORANDUM OPINION AND ORDER AND NOTICE OF APPARENT LIABILITY

Adopted: April 20, 1994; Released: April 28, 1994

By the Commission: Commissioner Quello concurring in part, approving in part, and issuing a statement.

I. INTRODUCTION

1. The Commission has before it for consideration: (i) license renewal applications for the six captioned radio stations in New York: (ii) a Petition to Deny timely filed by the New York State Conference of Branches of the National Association for the Advancement of Colored People and its Syracuse branch (NAACP) against WSEN(AM)/WSEN-FM;[2] (iii) Petitions to Deny timely filed by the National Hispanic Media Coalition (NHMC) against the other licensees captioned above; (iv) oppositions from the licensees: and (v) the licensees' responses to staff letters of inquiry. The NAACP and NHMC allege that the above stations violated the Commission's equal employment opportunity (EEO) Rule and policies toward minorities. The petitioners request that the Commission designate the licensees' renewal applications for hearing and deny the applications.

II. BACKGROUND

2. In challenging an application pursuant to Section 309(d) of the Communications Act, a petitioner must demonstrate party in interest status. In addition, a petitioner must, as a threshold matter, submit "specific allegations of fact sufficient to show... that a grant of the application would be prima facie inconsistent with [the public interest, convenience, and necessity]." 47 U.S.C. Section 309(d)(1); *Astroline Com. Co. Ltd. Partnership v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988) (*Astroline); Application of Dubuque T.V. Limited Partnership and Sage Broadcasting Corporation of Dubuque, Iowa for Assignment of Television License for KDUB-TV, Dubuque, Iowa*, 4 FCC Rcd 1999 (1989). The allegations, except for those of which official notice may be taken, must be supported by the affidavit of a person with personal knowledge of the facts alleged. 47 U.S.C. Section 309(d)(1).

3. Filed with the NAACP's petition to deny was a declaration under penalty of perjury from the president of the Syracuse, New York branch of the NAACP, who claimed to be a regular listener to Stations WSEN(AM)/WSEN-FM. Filed with the NHMC's petitions to deny were declarations under penalty of perjury from an NHMC member who claimed to live in New York City and to be a regular listener to the four above-captioned New York City stations. We find that the declarations meet the requirements for establishing standing for the NAACP for WSEN(AM)/WSEN-FM and for the NHMC for WOR(AM), WQXR(AM)/WQXR-FM, and WINS(AM). *See American Legal Foundation v. FCC*, 808 F.2d 84 (D.C. Cir. 1987) (*American Legal)*. Therefore, the challenges filed by the NAACP and NHMC constitute valid petitions to deny against the captioned stations.

III. PLEADINGS

4. The NAACP and NHMC derived their factual allegations from the licensees' EEO programs and annual employment reports. The licensee of WSEN(AM)/WSEN-FM argued that the NAACP failed to present a prima facie case demonstrating that the licensee had discriminated in its hiring practices. It asserted that the NAACP merely stated that the stations had no Black employees and that more was required in order to present a prima facie case. The licensee of WOR(AM) also argued that the NHMC failed to present a prima facie case, stating that NHMC's argument

[1] Station WQXR(AM) changed its call sign to WQEW(AM) on November 16, 1992. For consistency, we refer to it as WQXR(AM) throughout this document.

[2] The NAACP challenged the renewal applications of 16 radio stations in New York. The current *Order* addresses the application of two of those stations, WSEN(AM)/WSEN-FM. We will address the applications of the remaining stations separately.

was based upon how many minorities were employed at WOR(AM). As is discussed below in the sections of this Order dealing with WSEN(AM)/WSEN-FM and WOR(AM), the NAACP and NHMC, respectively, presented several arguments regarding the licensees' EEO programs as well as their employment profiles. Review of the allegations against all of the licensees in this Order led us to conclude that the petitioners presented a prima facie case demonstrating that unconditional grant of the renewal applications would have been inconsistent with the public interest. Section 309(d)(1) of the Communications Act, 47 U.S.C. Section 309(d)(1).[3] *Astroline, supra.* Further inquiry was, therefore, necessary. *See Beaumont Branch of the NAACP and the National Black Media Coalition v. FCC*, 854 F.2d 501, 506 (D.C. Cir. 1988) (*Beaumont*); *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621 (D.C. Cir. 1978) (*Bilingual*).

5. However, review of the entire record, including the licensees' responses to further inquiries, indicates that there are no substantial and material questions of fact warranting designation for hearing. In addition, we find no evidence that any of the licensees engaged in discrimination. Thus, grant of each renewal application will serve the public interest. 47 U.S.C. Section 309(d)(2). *Astroline, supra.* Accordingly, the challenges against the licensees' renewal applications filed by the NAACP and NHMC are denied. The renewal application of WINS(AM) will be granted without condition and the renewal applications of the other licensees will be granted but with remedies and sanctions as noted, *infra.*

IV. DISCUSSION

6. Section 73.2080 of the Commission's Rules requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. When evaluating EEO performance, the Commission focuses on the licensee's efforts to recruit, employ and promote qualified women and minorities and the licensee's ongoing assessment of its EEO efforts. Such an assessment enables the licensee to take corrective action if qualified women and minorities are not present in the applicant pool. The Commission also focuses on any evidence of discrimination by the licensee. See Sections 73.2080 (b) and (c) of the Commission's Rules, 47 C.F.R. Sections 73.2080 (b) and (c).

7. When a renewal application indicates an absence of discrimination and a record of adequate EEO efforts, the application is granted, if otherwise appropriate. When it fails to evidence a record of adequate EEO efforts, the Commission may impose a variety of sanctions or remedies, such as reporting conditions, renewal for less than a full term, forfeiture, or a combination thereof. Further, the Commission will designate the application for hearing if the facts so warrant. *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987) (hereinafter *Broadcast EEO), petition for reconsideration pending; see also* 4 FCC Rcd 1715 (1989) (request for clarification by National Association of Broadcasters) (hereinafter *Clarification of Broadcast EEO). See e.g., Beaumont, supra; Bilingual, supra.*

WSEN(AM)/WSEN-FM, Baldwinsville, New York

8. A review of the licensee's 1991 EEO Program Report, opposition to the petition to deny and response to our inquiry reveals that the licensee had 27 overall, including 25 upper-level, full-time hiring opportunities from February 12, 1988, through April 29, 1991.[4] The licensee recruited for 22 of its vacancies, did not recruit for one, and does not know if it recruited for four positions because files are missing. It used general recruitment sources as follows: internal job postings (done for 22 vacancies), *Herald Journal/Post Standard* (21 vacancies), Women in Communications (19 vacancies), Syracuse University (14 vacancies), Onondaga Community College (12 vacancies), Mohawk Valley Community College (nine vacancies), National Organization for Women and the *Syracuse Banner* (seven vacancies each), and LeMoyne College (six vacancies). It used the following sources for five or fewer vacancies: 10 newspapers and magazines, three employment agencies, 20 colleges and other schools, the New York State Department of Labor, the Human Rights Commission of Syracuse and Onondaga Counties, and on-air ads on its own and three other stations. Its records on minority referrals are incomplete, but it reported eight minority referrals from general sources, six from the *Herald Journal/Post Standard* and two from the New York State Department of Labor.

9. The licensee used one minority recruitment source, the Urban League, which it contacted for five vacancies and from which it received five minority referrals. The licensee had records on the race of applicants for 20 applicant/interview pools. It reported that it received applications from at least 13 minority applicants and interviewed six minorities in a total of six interview pools (four upper-level) out of a total of 258 interviewees. Thus, minorities were absent from the interview pools for 21 of 27 positions. In one of the six pools, it invited a minority, who did not come, for an interview. The licensee hired no minorities.[5]

10. The NAACP notes that the licensee used only one minority recruitment source, received few minority referrals and hired no minorities. Consequently, the NAACP argues, the licensee's efforts are insufficient to obtain an adequate number of minorities in applicant pools. It also criticizes the licensee for proposing no changes to its EEO program despite a deficient record. The petitioner argues that the licensee's excuse for its deficient

[3] The licensees were not challenged regarding their recruitment of women. Nonetheless, as is our practice in all cases, we reviewed the licensees' EEO efforts in this respect. We found them to be sufficient.

[4] The license terms for all of the stations in this *Order* ended on May 31, 1991.

[5] Baldwinsville, New York is included in the Syracuse, New York MSA, which is 42.8% female and 6.0% minority (4.2% Black, 0.8% Hispanic, 0.5% Asian-Pacific Islander, and 0.5% American Indian). The licensee employed no minorities during the term. Its Annual Employment Reports for 1985-91 indicate that the licensee employed from 10 to 18 persons overall (nine to 16 upper-level) with an average of 14 overall (12 upper-level).

EEO performance, that it is located 20 miles from downtown Syracuse, is not a legitimate reason for an inadequate program.

11. The licensee responded that the NAACP failed to present any evidence that its EEO program was defective. The licensee noted that it continually updated and expanded a list of recruitment sources, ultimately contacting 50 sources over the term for openings. Although its records are incomplete, the licensee changed its record-keeping procedures and has complete records on all 16 openings filled after July 1989. The licensee argued that it has had difficulty attracting minority applicants because it has a small staff, the labor force has few minorities, and it cannot afford to pay wages which are competitive with Syracuse stations.

12. The licensee also argues that it should be allowed to use an alternative labor force, i.e., the city of Baldwinsville, and that commuting difficulties from Syracuse to Baldwinsville should mitigate any sanctions for the minority recruiting problems the stations have had. The licensee asserts that on "numerous occasions," Syracuse applicants of all races have refused to come in for interviews when they learn the location of the stations. It stated in response to a Commission inquiry that 11 of its 14 employees on June 1, 1991, lived within 10 miles of the stations, one lived in Syracuse, one lived 25 miles away, and another lived 35 miles away. The licensee further states that the 1980 census figures for Baldwinsville indicate a population that is 1.1% minority, including a total of 32 Blacks and 42 Hispanics.

13. After reviewing the record of Stations WSEN(AM)/WSEN-FM, we find no substantial and material questions of fact sufficient to warrant a hearing. *See Astroline, supra.* The licensee engaged in recruitment and interviewed minorities. We find no evidence indicating that the licensee engaged in discrimination.

14. However, the licensee's efforts to recruit minorities were deficient because it failed to recruit so as to attract an adequate pool of minority applicants for at least 66% (18) of its 27 full-time positions. Only six (22%) of the 27 overall applicant/interview pools and four (16%) of the 25 upper-level applicant/interview pools contained minorities. Notwithstanding the absence of minorities from the applicant and interview pools as noted above, it does not appear that the licensee consistently engaged in efforts to attract minorities or otherwise engaged in meaningful self-assessment of its program. In this regard, the licensee failed to use minority sources for 22 vacancies. Accordingly, a base forfeiture of $12,500 and reporting conditions are warranted. *See Policy Statement,* FCC 94-27 (Released February 1, 1994).

15. Further, the licensee's failure to recruit so as to attract an adequate pool of minority applicants for at least 33% of the overall and upper-level full-time positions renders its EEO efforts egregiously deficient warranting an upward forfeiture adjustment of $6,250. Similarly, the combination of the above and and its large number of hiring opportunities (27) warrants a further $6,250 upward adjustment, for a total forfeiture of $25,000. Given the number and types of deficiencies noted, a short term renewal is also warranted. *See Policy Statement, supra.*

16. Moreover, we find the licensee's argument for an alternative labor force to be without merit. The standard for such a request is a three-part test: distance of the station from areas with significant minority population in the MSA, commuting difficulties, and the lack of success of previous recruitment efforts. *See Applications of Certain Broadcast Stations Serving Communities in the Miami, Florida Area,* 5 FCC Rcd 4893, 4899 n.6 (1990); *Application of National Capital Christian Broadcasting, Inc. for Renewal of License of Station WTKK(TV), Manassas, Virginia,* 3 FCC Rcd 1919, 1922 n.9 (1988) (*Manassas);* and *Broadcast EEO, supra,* at 3973.

17. In *Manassas,* the licensee argued that it should be allowed to use the alternative labor force of the county in which its station was located and noted that it was 30 miles from the minority population center of its MSA. The Commission denied the request, noting that five of the 20 persons employed by the station in the last year of the term commuted more than 40 miles to work. *Manassas* at 1920. The Commission also noted that it would be appropriate to use an alternative labor force if a licensee could document that it was unable to obtain qualified applicants from areas of minority concentration despite "extensive recruitment involving use of minority referral sources." *Id.*

18. In the instant case, the stations are 20 miles from the minority population center and three of the licensee's 14 employees at the end of the license term lived 20 or more miles from the stations. In addition, the licensee used only one minority recruitment source. It was used for only five of the 27 vacancies. Further, the licensee used only general sources for 17 additional vacancies. These sources produced no minority referrals for 14 of the 17 referenced vacancies. Finally, no recruitment can be verified for five additional vacancies. The above does not qualify as "extensive recruitment" within the meaning of *Manassas.* Accordingly, the licensee has failed to justify use of Baldwinsville as an alternative labor force.

19. After consideration of all of the above, we will issue a Notice of Apparent Liability for $25,000, renew the licenses for a short term, and impose reporting conditions.

WOR(AM), New York, New York

20. A review of the licensee's 1991 EEO Program Report, opposition to the petition to deny and response to our inquiry reveals that the licensee had 14 overall, including six upper-level, full-time hiring opportunities from October 23, 1989, through February 2, 1991.[n] The licensee recruited for 10 of its vacancies and used general recruitment sources for various numbers of openings as follows: In-house postings (eight openings), industry referrals (four openings), *New York Times* (three openings), employee referrals (three openings), *Newsday* (two openings), and New York Market Radio Association (one opening). It received three minority referrals, one each from industry referrals, employee referrals, and the *Times.* The licensee used minority recruitment sources as follows but obtained no minority referrals: *El Diario La Prenza* (seven openings), *Amsterdam News* (five openings), National Puerto Rican Forum (one opening), and Puerto Rican Family Institute (one opening).

[n] The licensee has owned the station since September 1989.

21. The licensee reported that it received 61 minority applicants, who were present in six applicant pools (two upper-level). It interviewed 16 minorities in the same six pools. Of the 14 hires, three were minority -- two Hispanics and one Black, all hired for lower-level positions.[7] In addition, the licensee reported that it promoted a minority part-time employee to a full-time position.

22. The NHMC argues that the licensee failed to implement an adequate program for employment of Hispanics and other minorities and failed to self-assess its deficient EEO program or propose needed improvements. It criticizes the licensee for obtaining few minority referrals and for having few pools with minority applicants. It states that labor force estimates from the Bureau of Labor Statistics indicate that Hispanics comprise 20.2% of the New York City labor force as of 1989 and that minorities comprise 50.3%. Citing this information, the NHMC criticizes the licensee for employing no Hispanics among its 54 upper-level employees in 1990 and few minorities overall in 1990. The NHMC used New York City estimated figures in its analysis of all four petitioned New York stations that are discussed in this Order. We note, however, that the Commission uses 1980 Census data for license terms ending in 1991 and that the applicable figures for New York City stations are found in the statistics for the entire New York City MSA -- not just the labor force of the city. These figures are listed in note 7, *supra*.

23. The licensee responded that it had its license for only the last 20 months of the license term and inherited a station whose EEO program was run through the previous licensee's offices and not directly at the station. Because of this, the current licensee stated, it had to establish a new EEO program for WOR(AM). It also noted that it hired only one person full-time between the time it obtained the station in late September 1989 and the time it filed its 1990 Annual Employment Report in March 1990. The licensee argues that the NHMC's criticisms are primarily based on the 1990 report, which the licensee asserts has little relevance because it had only one hiring opportunity before filing the report. In addition, the licensee asserts that the NHMC is alleging that the station has a deficient EEO program only because of how many minorities it employs. The licensee disagrees that it has had a deficient record of attracting minorities, noting that it lost no minorities and added two Hispanic employees (one in an upper-level position) and one Black at the same time it reduced its overall workforce by seven positions. It notes, also, that it inherited no Hispanics in upper-level positions from the previous licensee. Furthermore, it increased its upper-level minority employees from 1990 to 1991 by four while reducing its total upper-level workforce by five positions. The licensee also stated that it added sources, including minority sources, during the term.

24. After reviewing the record of Station WOR(AM), we find no substantial and material questions of fact sufficient to warrant a hearing. *See Astroline, supra*. The licensee engaged in recruitment and hired and employed minorities and women. We find no evidence indicating that the licensee engaged in discrimination.

25. However, the licensee's efforts to recruit minorities were deficient because it failed to recruit so as to attract an adequate pool of minority applicants for at least 66% (nine) of its 14 full-time positions. Only six (43%) of the 14 applicant/interview pools contained minorities. Notwithstanding the absence of minorities from the applicant and interview pools as noted above, it does not appear that the licensee consistently engaged in efforts to attract minorities or otherwise conducted meaningful self-assessment of its program. In this regard, the licensee failed to recruit for four of 14 vacancies. In addition, it failed to use minority recruitment sources for seven vacancies. Accordingly, a base forfeiture of $12,500 and reporting conditions are warranted. *See Policy Statement, supra*.

26. Furthermore, the labor force in the licensee's location is 37.8% minority which renders its EEO efforts egregiously deficient warranting an upward forfeiture adjustment of $11,250. *See Policy Statement, supra*. In light of the above, we will issue a Notice of Apparent Liability for $23,750 and renew the licenses subject to reporting conditions.

WQXR(AM)/WQXR-FM, New York, New York

27. A review of the licensee's 1991 EEO Program Report, opposition to the petition to deny and responses to our inquiries reveals that the licensee had 19 overall, including 10 upper-level, full-time hiring opportunities from February 17, 1988, through February 11, 1991. The licensee recruited for 13 of its vacancies and used the following general recruitment sources: *New York Times* (used for 10 openings) and miscellaneous industry sources (six openings). Used for one or two openings each were: three schools and colleges, two magazines, Christian Life Center, Mobil out placement, a temporary employment service, and employee referrals. It received nine minority referrals from the *Times*, five from the temporary agency, three from employee referrals, and two from miscellaneous industry sources. Minority sources contacted were: *Amsterdam News* (three openings), *El Diario* (three openings), Harlem School (two openings), Hispanic Policy Development Project (one opening), and the Community Service Council of Greater Harlem (one opening). It received two minority referrals from the *Amsterdam News* and two from *El Diario*. The licensee also reported 27 minority referrals from unknown sources.

28. The licensee stated that it gathered only partial records on the race of applicants because New York state law prohibits pre-employment inquiries as to the race of applicants. The licensee stated, however, that at least 49 Blacks and 19 Hispanic applicants applied for jobs at the stations and that minorities were in at least 13 applicant/interviewee pools (seven upper-level). It reported that it interviewed 36 Blacks and nine Hispanics out of 156

The labor force of the New York, New York MSA is 45.1% female and 37.8% minority (19.7% Black, 14.4% Hispanic, 3.6% Asian-Pacific Islander, and 0.1% American Indian). The licensee's Annual Employment Report for 1990 indicates that the licensee employed 68 persons overall (54 upper-level) with 11 minorities (16.2%). It employed nine Blacks (13.2%), one Hispanic (1.5%), and one Asian. In upper-level positions, it employed six minorities (11.1%) -- all Black. In 1991, the licensee employed 61 persons overall (49 upper-level) with 14 minorities (23.0%). It employed nine Blacks (14.8%), three Hispanics (4.9%), one Asian (1.6%), and one American Indian. In upper-level positions, it employed 10 minorities (20.4%) -- seven Blacks (14.3%), one Hispanic (2.0%), one Asian, and one American Indian.

total interviewees. Of the 19 overall and 10 upper-level hires, eight were minorities -- all Blacks, two of whom were hired for upper-level positions.[8]

29. The NHMC argues that the licensee failed to implement an adequate EEO program for Hispanics and failed to self-assess adequately. Because its petition is based on uncorrected annual employment reports, it claims that the station failed to employ Hispanics in any year of the license term and failed to hire Hispanics. It asserts that the licensee's EEO program includes virtually no efforts directed at Hispanics and that the licensee used only one Hispanic recruitment source. The NHMC argues that the licensee proposed no remedial changes to improve Hispanic recruitment deficiencies.

30. The licensee acknowledged that it has not done as well with Hispanic recruitment as it has with recruiting Blacks. It stated that part of its difficulty is due to a fairly low turnover in personnel. In addition, the licensee cited 1980 census data indicating that only 4% of Hispanics in the MSA are in jobs similar to upper-level broadcasting positions, a factor which the licensee stated makes its attempts at recruiting Hispanics for upper-level jobs more difficult. The licensee disagreed that its program is inadequate and noted that it specifically targeted Hispanics in part by using two Hispanic sources. It further noted that the *New York Times* and the *Amsterdam News* referred Hispanic applicants and, although it hired no Hispanics for full-time positions, it obtained 19 Hispanic referrals. In addition to specific recruitment for specific openings, the licensee said its personnel also try to recruit potential minority employees by attending an annual broadcast career workshop for minorities where 10 to 15% of students attending are Hispanic. It also contacts representatives of Hispanic organizations at quarterly community meetings conducted by the New York Radio Broadcasters' Association and has posted "numerous" openings at the Harlem School of the Arts. The licensee denied that it has failed to self-assess, and noted that it intensified its EEO program in 1990 and hired more minorities after that time, although all were Black.[9]

31. After reviewing the record of Stations WQXR(AM)/WQXR-FM, we find no substantial and material questions of fact sufficient to warrant a hearing. *See Astroline, supra.* The licensee engaged in minority recruitment, interviewed Hispanics and other minorities, and hired minorities. It also promoted an Hispanic employee from part-time to full-time. We find no evidence indicating that the licensee engaged in discrimination. While the licensee failed to recruit for six of 19 vacancies and failed to use minority sources for 16 vacancies, we note that 68% (13 of 19) of the licensee's overall applicant/interview pools and 70% (seven of ten) upper-level applicant/interview pools contained minorities. We believe that its overall efforts were such that no forfeiture sanction is warranted. In this regard, in addition to obtaining minorities in a significant number of applicant/interview pools, the licensee hired eight Blacks, the dominant minority group in the labor force, -- two for upper-level positions. Thus, the licensee hired Blacks, who constitute 19.7% of the labor force, for 42.1% of overall and 20% of upper-level vacancies. Finally, it is clear that the licensee engaged in self-assessment, intensifying its program in 1990. Accordingly, renewal of the licenses is appropriate.

32. However, the licensee used only two Hispanic recruitment sources despite being aware of its difficulties in attracting Hispanics, who comprise 14.4% of the relevant labor force. Accordingly, we impose reporting conditions to ensure that the licensee engages in more efforts to recruit Hispanics.

WINS(AM), New York, New York

33. A review of the licensee's 1991 EEO Program Report, opposition to the petition to deny and responses to our inquiries reveals that the licensee had 48 full-time hiring opportunities (23 upper-level) from December 9, 1987, through October 2, 1990. The licensee has records indicating outside recruitment for 17 vacancies. It used general recruitment sources as follows: internal job postings (44 vacancies), employment agencies (14 vacancies), New York Department of Labor (12 vacancies), employee referrals (12 vacancies), and the National Association of Broadcasters (seven vacancies). Used for one to two vacancies were the *New York Times, Newsday*, a secretarial school, and three radio associations such as the Radio Advertising Bureau. It received 52 minority referrals from general sources as follows: 21 from employment agencies, 16 from employees, eight from internal postings, four from the N.Y. Department of Labor, and one each from the *New York Times*, a secretarial school, and a radio association.

34. The licensee used minority recruitment sources as follows: Urban League (12 vacancies), National Black Media Coalition (10 vacancies), National Puerto Rican Forum (NPRF) (nine vacancies), National Association of Hispanic Journalists (NAHJ) (seven vacancies), National Association

[8] The labor force of the New York City MSA is as stated in note 7, *supra*. In every year of the license term, the licensee employed Blacks, but no other minorities, in upper-level positions. The licensee's Annual Employment Report for 1985 indicates that it employed 42 persons overall (32 upper-level) with seven minorities (16.7%) -- all Blacks, four (12.5%) of whom were in upper-level positions. In 1986, the licensee employed 41 persons overall (31 upper-level) with six minorities (14.3%) -- all Blacks, three (9.7%) in upper-level positions. In 1987, the licensee employed 38 persons overall (29 upper-level) with six minorities (15.8%) -- five Blacks (13.2%) and one Asian. Three Blacks (10.3%) were in upper-level positions. In 1988, the licensee employed 37 persons overall (31 upper-level) with six minorities (16.2%) -- five Blacks (13.5%) and one Asian. Three Blacks (9.7%) were in upper-level positions. In 1989, 1990, and 1991, the licensee's Annual Employment Reports mistakenly identified a female full-time lower-level employee as White when she was in fact Hispanic. The corrected figures are as follows. In 1989, the licensee employed 38 persons overall (31 upper-level) with eight minorities (21.1%) -- six Blacks (15.8%), one Hispanic (2.6%), and one Asian. Four Blacks (12.9%) were in upper-level positions. In 1990, the licensee employed 44 persons (35 upper-level) with 10 minorities (22.7%) -- eight Blacks (18.2%), one Hispanic (2.3%), and one Asian. Three Blacks (8.6%) were in upper-level positions. In 1991, the licensee employed 40 persons overall (32 upper-level) with seven minorities (17.5%) -- six Blacks (15.0%) and one Hispanic (2.5%). Two Blacks (6.3%) were in upper-level positions.

[9] Although no Hispanics are reported on annual employment reports, the licensee stated that, in 1984, it employed one Hispanic who left the stations before a new report was filed. It also stated that it hired an Hispanic woman for a lower-level position part-time in 1986 and promoted her to full-time after the 1988 annual employment report was filed. The licensee reported that it then mistakenly identified her as White on the next three reports.

of Black Journalists (NABJ) (six vacancies), Black Representative Association of New York (four vacancies), and the Minority Job Bank (four vacancies). It received three minority referrals from minority sources -- one each from the NPRF, NAHJ, and NABJ. The licensee interviewed all 92 minorities (59 Blacks, 23 Hispanics, and 10 Asians) who applied for openings at the station and minorities were present in 34 interview pools (14 upper-level). The licensee hired 13 minorities (nine Blacks, three Asians, and one Hispanic) overall, three of whom (two Asians and one Black) were hired for upper-level positions.[10]

35. The NHMC argues that the licensee has failed to implement an adequate EEO program for minorities, assess its deficient program, and propose needed improvements. It criticizes the licensee for using only two Hispanic sources and for obtaining few minority referrals. It also criticizes the licensee for employing too few Hispanics relative to their presence in the labor force.

36. The licensee responded that it has an adequate EEO program and that has assessed its program. It states that its assessment has led to the expansion of its source list, including the addition of three Hispanic sources. The licensee noted that it has frequently used internal job postings and that its encouragement of employee referrals has resulted in a number of minority referrals from employees. It also noted that it has hired a significant percentage of minorities in the last three years of the license term and throughout the term.

37. After reviewing the record of Station WINS(AM), we find no substantial and material questions of fact sufficient to warrant a hearing. *See Astroline, supra.* The licensee recruited, interviewed, and hired minorities during its license term. We find no evidence indicating that the licensee engaged in discrimination. While the licensee failed to recruit for 31 of 48 vacancies and failed to use minority sources for 36 vacancies, we note that 70.8% (34 of 48) of the licensee's applicant/interview pools contained minorities. We believe that its overall efforts were such that no forfeiture sanction is warranted. In this regard, in addition to obtaining minorities in a significant number of applicant/interview pools, the licensee hired 13 minorities, three for upper-level positions. Thus, the licensee hired minorities, who constitute 37.8% of the labor force, for 27.1% of vacancies. Further, we note that in all seven years of the license term overall and in five years upper-level, minorities were employed in excess of 50% of parity. Finally, it is clear that the licensee engaged in self-assessment, adding recruitment sources, including three Hispanic sources. Accordingly, renewal of the licenses is appropriate.

38. However, the licensee failed to recruit for most vacancies and hired only one Hispanic, despite the fact that Hispanics comprise 14.4% of the relevant labor force. Accordingly, we impose reporting conditions to ensure that the licensee engages in more efforts to recruit Hispanics.

V. CONCLUSION

39. After considering the information before us, we find that hearings are not warranted and the records of the licensees of WSEN(AM)/WSEN-FM, WOR(AM), WQXR(AM)/WQXR(FM), and WINS(AM) support grant of their renewal applications. The licenses of WSEN(AM)/WSEN-FM and WOR(AM) will be renewed subject to reporting conditions and Notices of Apparent Liability for $25,000 and $23,750 respectively, because of their deficient EEO recruitment efforts. In addition, the licenses of WSEN(AM)/WSEN-FM will be renewed for a short term. The licenses of WQXR(AM)/WQXR-FM and WINS(AM) will be renewed subject to reporting conditions because of the need to improve the stations' recruitment of Hispanics.

VI. ORDERING CLAUSES

40. Accordingly, IT IS ORDERED that the petition to deny filed by the NAACP against the licensee of WSEN(AM)/WSEN-FM IS DENIED.

41. IT IS FURTHER ORDERED that the petitions to deny filed by the NHMC against the licensees of WOR(AM), WQXR(AM)/WQXR-FM, and WINS(AM) ARE DENIED.

42. IT IS FURTHER ORDERED that the license renewal applications filed by Buckley-WOR Broadcasting Corporation for Station WOR(AM), Interstate Broadcasting Company, Inc. for Stations WQXR(AM)/WQXR-FM, and Group W Radio, Inc. for Station WINS(AM) ARE GRANTED subject to the EEO reporting conditions specified herein.

43. IT IS FURTHER ORDERED that the license renewal applications filed by Buckley Broadcasting Corporation for Stations WSEN(AM)/WSEN-FM ARE GRANTED FOR A SHORT TERM ending June 1, 1996, subject to reporting conditions as described herein and, pursuant to Section 503 of the Communications Act of

[10] The labor force for WINS(AM) is as stated in note 7, *supra*. The licensee's Annual Employment Report for 1985 indicates that it employed 89 persons overall (70 upper-level) with 23 minorities. It employed 15 Blacks (16.9%), seven Hispanics (7.9%), and one Asian. In upper-level positions, it employed 15 minorities (21.4%) -- 11 Blacks (15.7%) and four Hispanics (5.7%). In 1986, the licensee employed 83 persons overall (65 upper-level) with 21 minorities (25.3%). It employed 16 Blacks (19.3%), four Hispanics (4.8%), and one Asian. In upper-level positions, it employed 13 minorities (20.0%) -- 11 Blacks (16.9%) and two (3.1%) Hispanics. In 1987, the licensee employed 90 persons overall (70 upper-level) with 21 minorities (23.3%). It employed 14 Blacks (15.6%), five Hispanics (5.6%), and two Asians. In upper-level positions, it employed 13 minorities (18.6%); 10 Blacks (14.3%), two Hispanics (2.9%), and one Asian. In 1988, it employed 93 persons overall (73 upper-level) with 22 minorities (23.7%). It employed 15 Blacks (16.1%), five Hispanics (5.4%), and two Asians. In upper-level positions, it employed 14 minorities (19.2%) -- 10 Blacks (13.7%), three (4.1%) Hispanics, and one Asian. In 1989, the licensee employed 96 persons overall (75 upper-level) with 23 minorities (24.0%). It employed 14 Blacks (14.6%), six Hispanics (6.3%), and three Asians. In upper-level positions, it employed 13 minorities (17.3%); nine Blacks (12.0%), three Hispanics (4.0%), and one Asian. In 1990, it employed 93 persons overall (73 upper-level) with 25 minorities (26.9%). It employed 16 Blacks (17.2%), six Hispanics (6.5%), and three Asians. In upper-level positions, it employed 14 minorities (19.2%) -- nine Blacks (12.3%), three (4.1%) Hispanics, and two Asians. In 1991, the licensee employed 93 persons overall (73 upper-level) with 23 minorities (24.7%). It employed 13 Blacks (14.0%), six Hispanics (6.5%), and four Asians. In upper-level positions, it employed 15 minorities (20.6%); 10 Blacks (13.7%), three Hispanics (4.1%), and two Asians.

1934, as amended, 47 U.S.C. Section 503, a NOTICE OF APPARENT LIABILITY FOR FORFEITURE in the amount of $25,000.

44. IT IS FURTHER ORDERED that, pursuant to Section 503 of the Communications Act of 1934, as amended, 47 U.S.C. Section 503, this document constitutes a NOTICE OF APPARENT LIABILITY FOR FORFEITURE in the amount of $23,750 for the licensee of WOR(AM).

45. IT IS FURTHER ORDERED that the licensees of Stations WOR(AM), WQXR(AM)/WQXR-FM, and WINS(AM) file an original and one copy of the following information on February 1, 1995, February 1, 1996, and February 1, 1997, and that the licensee of WSEN(AM)/WSEN-FM file an original and one copy of the following information on February 1, 1995, and February 1, 1996:

(a) For each report, please make two lists divided by full-time and part-time job vacancies during the twelve months preceding the respective reporting dates, indicating the job title, date of hire, the race or national origin, sex and the referral source of each applicant for each job and the race or national origin and sex of the person hired. The list should also note which recruitment sources were contacted;[11]

(b) a list of employees as of the January 1, 1995, payroll period for the first report[12] and as of the January 1, 1996, and the January 1, 1997, payroll periods for the second and third reports, by job title, indicating part-time or full-time status (ranked from the highest paid classification), date of hire, sex and race or national origin;

(c) details concerning the station's efforts to recruit minorities for each position filled during the period specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment. In addition, the licensee may submit any relevant information with regard to the station's EEO performance and efforts thereunder.

46. IT IS FURTHER ORDERED, that the Mass Media Bureau send by Certified Mail -- Return Receipt Requested -- one copy of this Memorandum Opinion and Order and Notice of Apparent Liability to all parties.

47. The reports are to be filed with the Secretary of the Commission for the attention of the Mass Media Bureau's EEO Branch. Should the parties have any questions regarding this action, they may telephone the Mass Media Bureau's EEO Branch at 202-632-7069. Regarding the forfeiture proceedings, the licensees of WSEN(AM)/ WSEN-FM and WOR(AM) may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this Memorandum Opinion and Order and Notice of Apparent Liability. Any comments relating to their ability to pay should include those financial letters set forth in the noted attachment.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[11] Such a list might start:

(1) News Director: Officials and Managers; Full-time.

3 Applicants:	1 White female	A.W.R.T.
	1 Black male	Urban League
	1 Black female	NAACP

Sources Contacted: Local Newspaper, A.W.R.T., Urban League and NAACP.

Selected: Black male (12/19/94).

[12] The licensee of WSEN(AM)/WSEN-FM should provide a list of employees as of the January 1, 1995, payroll period for its first report due February 1, 1995, and as of January 1, 1996, for the second report due February 1, 1996. It is not required to file a third report.

Concurring Statement of Commissioner James H. Quello

In Re Applications of Midland Broadcasters, Inc. et al.; Lotus Communications, Inc. and University of Southern California; Sun Mountain Broadcasting, Inc.; Commonwealth Broadcasting of Northern California et al.; Buckley Broadcasting Corp. et al.

With some consternation, I face yet again a series of Commission decisions designed to pit Big Brother against industry. With extreme reluctance, I concur in these items, recognizing that, for the most part, a sanction of some sort may be necessary in these cases due to the licensees' failure to comply with our equal employment opportunity rules. Most of these sanctions are against licensees in medium to large markets, where the resources to comply with our EEO rules are, presumably, more readily available than in small markets. In addition, several of the remiss licensees in these cases are located in markets with some of the highest concentrations of minorities in the country, thus providing further justification for sanctions.

Nonetheless, the severity of the sanctions in these cases compel me, yet again, to beseech my colleagues at the Commission to change their focus in ensuring compliance with these very important policies. Compliance could be encouraged -- I think more effectively than by means of harsh punishment -- through use of a "three strikes and you're out" policy. The first violation of our EEO or other rules (except for rules involving safety or intentional rule violations) would result in a warning and imposition of reporting conditions; a second violation would result in a fine and a short-term renewal; a third violation would result in a large fine or designation for hearing.

Another option to encourage, rather than painfully extract, compliance would be to allow broadcasters, as we currently allow common carriers, to settle cases where justified, entering into a consent decree with the Commission that is mutually beneficial to all the parties involved. The Commission would benefit from conserving resources, broadcasters would benefit from gaining prompt disposition of their applications, and minorities would benefit from the funds collected through consent decrees. In the consent decree or other context, I again urge that the Commission use monies collected through enforcement of EEO rules (and other rules as well) for constructive, positive, and practical affirmative purposes. Such purposes could include the funding of programs for educating and training minorities for careers in media, or for funding minority ownership of media properties.

I know that, right now, I am one of the few, but growing, voices for reform of our stepped-up enforcement scheme. But I will continue to be a voice -- persistent, balanced, and increasingly vocal -- supporting an innovative approach to ensuring equal opportunities for minorities. I remain convinced that the best way of ensuring equal opportunities is by working with, rather than against, the very industry that must provide these opportunities.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

Commonwealth Broadcasting
of Northern California

For Renewal — File No. BRH-90052940
of License for
Station KMZQ-FM
Henderson, Nevada

Broadcast Associates, Inc.

For Renewal — File Nos. BR-900517YB
of Licenses for — BRH-900517YF
Stations KFMS/KFMS-FM
Las Vegas, Nevada

Arizona Lotus Corporation

For Renewal — File Nos. BR-900531C3
of Licenses for — BRH-900531YJ
Stations KTKT/KLPX-FM
Tucson, Arizona

MEMORANDUM OPINION AND ORDER AND NOTICES OF APPARENT LIABILITY

Adopted: April 20, 1994; Released: April 28, 1994

By the Commission: Commissioner Quello concurring and issuing a statement.

I. INTRODUCTION

1. The Commission has before it for consideration: (i) license renewal applications filed for the three captioned radio stations in Nevada; (ii) license renewal applications filed for the two captioned radio stations in Arizona; (iii) a Petition to Deny timely filed on September 4, 1990, by the Idaho/Nevada/Utah State Conference of Branches of the NAACP, the Arizona State Conference of Branches of the NAACP and various local NAACP branches (collectively "NAACP") against the renewal applications of the captioned broadcast stations;[1] (iv) a Petition to Deny timely filed on September 4, 1990, by the National Hispanic Media Coalition and its member Richard Martinez (collectively "NHMC") against the renewal applications of Arizona Lotus Corporation for renewal of licenses for Stations KTKT/KLPX(FM); (v) oppositions from the licensees; and (vi) the licensees' responses to staff letters of inquiry.

II. BACKGROUND

2. The NAACP and NHMC allege that the challenged stations violated our Equal Employment Opportunity (EEO) Rule and policies. Accordingly, both organizations request that we conduct an investigation of the stations' employment practices pursuant to *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621 (D.C. Cir. 1978) (*Bilingual*), designate the renewal applications for hearing and, thereafter, deny the applications. The licensees charge that neither the NAACP nor the NHMC has presented evidence of discrimination, that the records indicate compliance with the Commission's EEO Rule, and that unconditional renewal is warranted.

III. PLEADINGS

3. *STANDING.* In challenging an application pursuant to Section 309(d) of the Communications Act, a petitioner must demonstrate party in interest status. In addition, a petitioner must, as a threshold matter, submit, "specific allegations of fact sufficient to show ... that a grant of the application would be *prima facie* inconsistent with [the public interest, convenience and necessity]." 47 U.S.C. § 309(d)(1); *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988) (*Astroline*); *Dubuque T.V. Limited Partnership*, 4 FCC Rcd 1999 (1989). The allegations, except for those of which official notice may be taken, must be supported by the affidavit of a person with knowledge of the facts alleged. 47 U.S.C. § 309(d)(1).

4. Submitted with the NAACP petition is a statement under penalty of perjury from the president of the Arizona State Conference of Branches of the NAACP who states that he subscribes to the petition and would be seriously aggrieved if it is not granted. He does not indicate, however, whether he resides in Tucson or whether he listens to stations KTKT/KLPX-FM. The licensee of KTKT/KLPX-FM argues that this statement is not sufficient to confer standing on the NAACP. We find that the NAACP's statement does not meet the requirements for standing for the Arizona State Conference of branches of the NAACP. *See American Legal Foundation v. FCC*, 808 F.2d 84 (D.C. Cir. 1987) (*American Legal Foundation*); *see also Petition for Rule Making to Establish Standards for Determining the Standing of a Party to Petition to Deny a Broadcast Application*, 82 FCC 2d 89 (1980) (citing *Warth v. Seldin*, 422 U.S. 490, 511 (1975)). Therefore, we will treat the NAACP's pleading as an informal objection pursuant to 47 C.F.R. § 73.3587. *See Michigan/Ohio Broadcast Renewals*, 3 FCC Rcd 6944 (1988); *see also KDEN Broadcasting Company*, 55 Rad. Reg. (P & F) 1311, 1311-12 (1984). Also submitted with the NAACP petition is a statement under penalty of perjury from the president of the Las Vegas Branch of the NAACP.

[1] As part of the same pleading, the NAACP filed a Petition to Deny and Intervene in a comparative renewal hearing for Stations KUKQ(AM)/KUPD-FM in Tempe, Arizona. The Commission denied the renewal applications of the licensee, Tri-State Broadcasting Co., Inc., and granted the mutually exclusive applications of Grimm & Clifford. *Tri-State Broadcasting Co., Inc.*, 5 FCC Rcd 1156 (Rev. Bd. 1990), *recon. denied*, 5 FCC Rcd 3727 (Rev. Bd. 1990). Thereafter, in a further *Order* related to the same proceeding, the Commission dismissed as moot the NAACP's Petition to Deny and Intervene. *Tri-State Broadcasting Co., Inc.*, 6 FCC Rcd 2604 (1991).

He states that he is a regular listener to KMZQ-FM (Henderson) and KFMS/KFMS-FM (Las Vegas) and that he would be seriously aggrieved if the petition is not granted. The licensee of KMZQ-FM argues that the declaration of the president of the Las Vegas Branch of the NAACP is insufficient to establish standing on his behalf, and subsequently, on behalf of the NAACP or its members, and that the NAACP's petition should be treated as an informal objection.[2] The licensee of KFMS/KFMS-FM does not challenge the NAACP's standing. We find that the statement of the president of the Las Vegas Branch of the NAACP meets the requirements for standing. Accordingly, we hold that the Idaho/Nevada/Utah State Conference of Branches of the NAACP and its affiliate branches have petitioner status against stations KMZQ-FM and KFMS/KFMS-FM. *American Legal Foundation, supra.*

5. The NHMC petition includes a sworn statement from Richard Martinez, a member of NHMC, who states that he resides in Tucson and listens to stations KTKT/KLPX-FM. The licensee of KTKT/KLPX-FM does not challenge the standing of NHMC and Mr. Martinez. We hold that the NHMC and Mr. Martinez have petitioner status against stations KTKT/KLPX-FM. *American Legal Foundation, supra.*

IV. DISCUSSION

6. *PRIMA FACIE CASE.* The NAACP and the NHMC derived their factual allegations from the licensees' EEO programs and annual employment reports. Review of the licensees' EEO records led us initially to conclude that the NAACP and the NHMC presented a *prima facie* case against the five stations demonstrating that unconditional grant of the renewal applications would have been inconsistent with the public interest. Section 309(d)(1) of the Communications Act of 1934, 47 U.S.C. § 309(d)(1). *Astroline, supra.*[3] Further inquiry was therefore necessary. *See Beaumont Branch of the NAACP and the National Black Media Coalition v. FCC,* 854 F.2d 501, 506 (D.C. Cir. 1988)(*Beaumont); Bilingual.*

7. Review of the NAACP's and the NHMC's EEO allegations, as well as each licensee's renewal applications, opposition and inquiry response, leads us to conclude that there are no substantial and material questions of fact warranting designation for hearing. In addition, we find no evidence of employment discrimination. Thus, grant of each application will serve the public interest. 47 U.S.C. § 309(d)(2); *Astroline, supra.* However, we will grant renewal with appropriate remedies and sanctions.

8. Section 73.2080 of the Commission's Rules, 47 C.F.R. § 73.2080, requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. When evaluating EEO performance, the Commission focuses on the licensee's efforts to recruit, employ and promote qualified minorities and women and the licensee's ongoing assessment of its EEO efforts. Such an assessment enables the licensee to take corrective action if qualified minorities and women are not present in the applicant pool. The Commission also focuses on any evidence of discrimination by the licensee. *See* Sections 73.2080(b) and 73.2080(c), 47 C.F.R. Section 73.2080(b) and 73.2080(c).

9. When the renewal application indicates an absence of discrimination and a record of adequate EEO efforts, the application is granted, if otherwise appropriate. When it fails to evidence a record of adequate EEO efforts, the Commission may impose a variety of sanctions or remedies, such as reporting conditions, renewal for less than a full term, forfeiture, or a combination thereof. Further, the Commission will designate the application for hearing if the facts so warrant. *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services,* 2 FCC Rcd 3967 (1987)(*Broadcast EEO), petition for recon. pending; see also* 4 FCC Rcd 1715 (1989)(request for clarification by the National Association of Broadcasters). *See e.g., Beaumont, supra; Bilingual, supra.*

KMZQ-FM, Henderson, Nevada[4]

10. Review of the licensee's consolidated opposition and inquiry response, as well as its renewal application, indicates that the licensee filled 35 full-time positions, including 27 upper-level job vacancies from December 28, 1988, to September 1, 1990. In its renewal application, the licensee indicates minority referrals from its contacts with the *Las Vegas Review Journal* (five), University of Nevada-Las Vegas (one), Women In Communications (one), and two minority referrals from its employees. In December 1990, the licensee filed an amended renewal application in which it reports an additional minority referral from the Nevada Employment Security Division, and seven minority referrals as a result of walk-in applicants and mailed-in resumes. In sum, the licensee reported 28 minority referrals, but could identify the referral sources for only 17 minorities. KMZQ-FM also used the following recruitment sources, but did not report any minority referrals from: *Latin American Press / Spanish News, Radio & Records,* National Broadcasting School, Clark County Community College, the NAACP, Indian Center of Las Vegas and the *Communicator.*[5] After a review of its EEO program in May 1990, a month before it had to file its renewal application, the station added general and minority referral groups for a total of 32 recruitment sources which it identifies in its inquiry response as "List 2." Our review indicates that for

[2] KMZQ-FM states that after the NAACP filed its petition, the station met with the president of the Las Vegas branch of the NAACP and that he disavowed his statements as presented in his declaration. We find the licensee's representations on this issue unsubstantiated because neither the NAACP or its counsel has withdrawn the declaration.

[3] The licensees were not challenged regarding their efforts directed toward women. Nonetheless, as is our practice in all cases, we reviewed each station's EEO efforts toward women and found them sufficient.

[4] On December 28, 1988, Commonwealth Broadcasting of Northern California assumed the license for KMZQ-FM from Pinnacle Communications Acquisition Corporation (File No. BALH-881104GJ). The license term under review ended on October 1, 1990.

[5] Apparently, the licensee grouped its recruitment sources by separate lists. Seven of the licensee's recruitment sources comprise what it refers to as "List 1": Clark County Community College, University of Nevada-Las Vegas, NAACP, Indian Center of Las Vegas, National Broadcasting School, Employment Security Department and Women In Communications.

the 35 full-time jobs, the licensee conducted recruitment in this manner: no recruitment for 10 jobs;[6] List 1 plus newspaper advertisements or an employment service for 10 jobs; *Radio & Records* for five jobs; advertisements in the *Communicator* for three jobs; List 2 for three jobs; List 1 for two jobs; List 2 plus newspaper advertisements for two jobs. Although the licensee did not provide information on the total number of applicants, it appears that KMZQ-FM attracted at least 28 minorities (13 Hispanics, 13 Blacks, 2 Asian-Pacific Islanders) in 13 applicant pools, seven of which were for upper-level jobs. It is unclear from the data how many minorities were interviewed. Most of the minorities were attracted to upper-level job pools after May 1990. Four minorities (three Hispanics, one Black) were hired, including two Hispanics for upper-level positions.[7]

11. The NAACP notes that the licensee's renewal application shows no minority referrals from KMZQ-FM's contact with the Indian Center of Las Vegas, and it claims that the local NAACP chapter has no record of receiving employment notifications from the station. Moreover, the NAACP objects to the station's reliance on the general circulation newspaper which produced only five minority referrals, saying that it limits minority participation at the station. Thus, the NAACP advocates use of more minority specific recruitment sources to attract applicants for each vacancy. Based on the renewal application, argues the NAACP, the inadequacy is evidenced by the hire of only one minority for an upper-level job in the last 12 months of the license term.

12. In response, the licensee states that it considers a strong affirmative action program a high priority because an Hispanic general partner controls more than 50% of the company. While stating that station records are incomplete, it submits copies of recruitment letters sent to the NAACP in Las Vegas and Baltimore, announcing a receptionist and sales vacancy. It further contends that reliance on the newspaper for applicants does not necessarily adversely affect minorities. In conclusion, the licensee states that it hired two minorities for upper-level positions during the renewal year, not one minority as asserted by the NAACP. The station explains that a male sales executive hired during the renewal year was a minority, a fact it was "unable to establish prior to the filing of the renewal application."

13. Further, the licensee states that it acquired the station 17 months prior to filing its renewal application and due to its many administrative and management concerns, " ... was in no position to reevaluate its Affirmative Action Program at an earlier date." According to KMZQ-FM, it hired a business manager in May 1990 who reevaluated the station's EEO program, expanded the recruitment sources, and mailed recruitment letters. The station indicates that the new sources have resulted in "numerous minority referrals for every position vacancy" that occurred after review of the employment procedures. It asserts that it has succeeded in increasing minority recruitment and employment during its tenure because only one minority was employed at KMZQ-FM when it was acquired.

14. Our investigation of the subject period record raises no substantial or material questions of fact warranting designation for hearing. *See Astroline, supra.* Likewise, it does not appear that the licensee engaged in employment discrimination. KMZQ-FM recruited, attracted and hired minorities during its tenure. Accordingly, grant of the station's renewal is warranted.

15. However, the licensee's recruitment efforts to attract qualified minorities were deficient because it failed to recruit so as to attract an adequate pool of minority applicants for at least 66% (23 jobs) of its 35 full-time positions. Our investigation indicates that minorities were included in only 13 (37%) of the applicant pools and 4 (11%) of the interview pools. Thus, minorities were absent from 63% of the applicant pools and 89% of the interview pools. Notwithstanding the absence of minorities from the applicant and interview pools as noted above, it does not appear that the licensee consistently engaged in efforts to attract minorities or otherwise conducted meaningful self-assessment of its program. In this regard, KMZQ-FM could not demonstrate that it affirmatively recruited for every vacancy. For example, for 18 of KMZQ(FM)'s 35 hiring opportunities, the licensee either failed to recruit or made minimal recruitment contact.[8] Accordingly, a base forfeiture of $12,500 and reporting conditions are warranted. *See Policy Statement,* FCC 94-27 (released January 31, 1994).

16. In addition, an upward forfeiture adjustment of $6,250 is appropriate due to the large number of hiring opportunities (35) during the license term. *See Policy Statement, supra.* Therefore, we will renew KMZQ-FM's license subject to reporting conditions and issue a Notice of Apparent Liability for $18,750.

KFMS/KFMS-FM, North Las Vegas, Nevada[9]

17. Review of the licensee's renewal applications, opposition and inquiry response indicates that during the period May 1, 1987, to May 1, 1990, the licensee filled 28 full-time job vacancies, including 21 upper-level positions. The licensee reports the following minority referrals: *Radio & Records*[10] (three), the National Broadcast School (one), a minority referral from an employee, and a minority walk-in applicant. As part of its recruitment efforts, KFMS/KFMS-FM indicates that along with placing adver-

[6] For the ten jobs for which we conclude that the licensee did not conduct recruitment, the licensee either did not contact referral sources, listed "staff referral" as its sole recruitment effort, or listed recruitment as unknown.

[7] KMZQ-FM is located in the Las Vegas, Nevada Metropolitan Statistical Area (MSA) with a labor force including 43.2% females and 18.3% minorities (8.4% Black, 7.1% Hispanic and 2.8% other). The 1989 Annual Employment Report listed 19 full-time employees, including one American Indian (5%). The upper-level staff of 16 employees included one American Indian (6%). The station's full-time staff decreased in 1990 to 16 employees, including one Hispanic (6%). The upper-level staff of 13 employees included one Hispanic (8%).

[8] In addition, we note that KMZQ-FM submitted post-term recruitment and hire data. Post-term EEO performance is not considered in the Commission's evaluation of a licensee's EEO record during a license term if that record, standing alone, is so deficient that it would merit denial of renewal or other sanctions. *Rust,* 73 FCC 2d 39, 53 (1979). Here, we will not consider the licensee's post-term recruitment because, as we state, *infra,* we find that the licensee's EEO record during the license term warrants a sanction.

[9] Effective February 1, 1988, the call sign for the AM station was changed from KRAM to KFMS(AM). We also note that KFMS-FM was assigned from Gilday Broadcasting, Company to Broadcast Associates, Inc. on October 1, 1986 (File No. BALH - 860916HN).

[10] In an amendment to its renewal applications, the licensee states that the number of minority referrals from *Radio & Records* are estimates.

tisements in two local general circulation newspapers, it contacted, but did not receive minority referrals from, these sources: Economic Opportunity Board of Clark County, Mexican Patriotic Committee, the NAACP, Las Vegas Paiute Tribal Council, Nevada Association of Latin Americans, the *Gavin Report*, Las Vegas Chapter of Women In Communications, Inc., and the Vietnam Veterans of America. KFMS/KFMS-FM did not indicate whether these sources were contacted for each vacancy during the three-year period, or whether certain sources were contacted for particular positions. In this regard, it states that it has not retained records of the recruitment sources used for each position or the number of applicants referred by a particular source for jobs filled from November 1987 to September 1990. It appears that the licensee did not recruit for 13 of the overall 28 vacancies.[11] For four jobs, the licensee contacted a temporary employment agency and hired each of the temporary employees for permanent full-time jobs. For an additional four hires, the licensee recruited through *Radio & Records*. Advertisements were placed in a local newspaper for a further three vacancies. The stations contacted National Broadcasting School for two jobs. For one job, the licensee used Women In Communications and placed an advertisement in a local newspaper. A national computer service was contacted for an additional job.

18. The stations claim that during the license term, ten of its openings were for announcer positions, and that it was difficult to identify the race or national origin of candidates in those applicant pools because they submitted resumes and voice tapes. KFMS/KFMS-FM explains that it does not request announcer applicants to indicate their race on resumes and it does not conduct interviews for these positions. The only method for race identification, according to the licensee, is voice characteristics on the audio tapes which applicants submit. KFMS/KFMS-FM did not submit any applicant flow data based on the results of its review of the submitted audio tapes. The licensee reports 229 applicants for nine of the 28 full-time positions, including nine minorities (five Hispanics, two Blacks, one American Indian and one Asian-Pacific Islander) for seven of the 28 jobs. Seven minorities (four Hispanics, one Black, one American Indian, one Asian-Pacific Islander) applied for five upper-level positions. Further, the licensee did not indicate the number of interviewees. Of the 28 full-time hires, three were minorities: one Black, one Hispanic, one American Indian. The American Indian was hired for an upper-level job. [12]

19. The NAACP faults the licensee for failing to identify any minority organizations as recruitment sources on its renewal applications -- particularly given the results of the stations contacts with *Radio & Records* and general circulation papers. According to the NAACP, the licensee received only seven minority applicants and hired only one minority from use of those sources in the renewal year (May 1, 1989, to May 1, 1990). The NAACP charges that, notwithstanding this lack of qualified minority applicants, the licensee "proposes nothing whatever to rectify its deficient EEO record."

20. KFMS/KFMS-FM responds that its failure to contact specific minority sources from May 1989 to May 1990 is not enough to challenge its renewal applications. The stations state that the NAACP has no basis on which to allege that it has no meaningful EEO program proposed for the next license term, and that such a program is not required. The licensee claims that the NAACP's argument regarding its "token employment" of one minority during the renewal year is unfounded. KFMS/KFMS-FM states that it hires the most qualified applicants, and that its minority hiring over the license term has been at 118% of parity of the minority labor force in the Las Vegas area.

21. Our review of the record discloses no substantial and material questions of fact warranting designation for hearing. *See Astroline, supra.* We also find no evidence of employment discrimination. Minorities applied, were interviewed and hired for full-time and upper-level job vacancies. Accordingly, grant of the renewal applications is appropriate.

22. However, the licensee's recruitment efforts to attract qualified minority applicants were deficient because it failed to recruit so as to attract an adequate pool of minority applicants for least 66% (18 jobs) of its 28 full-time vacancies. Our investigation indicates that minorities were included in seven (25%) of the 28 overall applicant pools and three (11%) of the 28 overall interview pools. Additionally, minorities were present in five (24%) of the 21 upper-level applicant pools and one (5%) of the 21 upper-level interview pools. Thus, minorities were absent from 75% of the overall applicant pools and 89% of the overall interview pools. Further, minorities were absent from 76% of the upper-level applicant pools and 95% of the upper-level interview pools. Notwithstanding the absence of minorities from the applicant and interview pools as noted above, it does not appear that the licensee consistently engaged in efforts to attract minorities or otherwise conducted meaningful self-assessment of its program. We note that the licensee failed to conduct affirmative recruitment for 13 vacancies, a significant number of hiring opportunities. Moreover, despite the low number of minority applicants, KFMS/KFMS-FM did not seek productive sources more likely to refer qualified minorities. Thus, a base forfeiture of $12,500 and reporting conditions are warranted. *See Policy Statement, supra.*

23. In addition, the licensee's failure to recruit so as to attract an adequate pool of minority applicants for at least 33% of the overall and upper-four full-time positions indicates egregiousness, warranting an upward adjustment of $6,250. Also, an upward adjustment of $6,250 is appropriate due to the large number of hiring opportunities (28) during the license term. The combination of the foregoing deficiencies, justifies a total forfeiture of $25,000. Given the number and types of deficiencies noted, a short term re-

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[11] We note that for three of the 13 jobs, the stations rehired former employees and for one job, it explains that the employee came to volunteer at the stations from the National Broadcasting School and was hired for one of the 28 full-time vacancies.

[12] *See* note 7, *supra*, for Las Vegas MSA statistics. Two Blacks (11%) were reported on the licensee's 1987 full-time staff of 19 employees. The upper-level staff of 17 employees included one Black employee (6%). In 1988, one Black was reported on the full-time staff of 20 employees (5%) and on the upper-level staff of 18 employees (6%). The stations' 1989 Annual Employment Report indicated one Black (5%) on the full-time staff of 20 persons, and on the upper-level staff of 18 employees (6%). In 1990, KFMS/KFMS-FM reported two minorities (10%), one Black and one Hispanic on its full-time staff of 20 employees. The Black employee (6%) was included on the upper-level staff of 18 employees.

newal is also warranted. *See Policy Statement, supra.* Accordingly, we will renew the licenses for less than a full term subject to reporting conditions and issue a Notice of Apparent Liability for $25,000.

KTKT/KLPX-FM, Tucson, Arizona[13]

24. Review of the licensee's renewal applications, opposition and inquiry response reveals the licensee filled 27 full-time positions, including 20 upper-level vacancies from May 1, 1987, to April 30, 1990. For those positions, the licensee reported receiving minority referrals from the *Arizona Daily Star* (five), an unidentified newspaper (three), the *Tucson Citizen* (three), employee referrals (one), and personal references (one). In addition, the stations indicate that it "biannually sought referrals" from ten personnel and job placement agencies, six educational organizations/institutions, seven minority organizations, six women's groups and two newspapers[14] and attracted 68 minority referrals (55 Hispanics, eight Blacks, three Asian-Pacific Islanders, and two American Indians). KTKT/KLPX-FM did not report that the biannual contacts were for specific positions. The licensee indicates that all of its minority referrals completed applications, however, it did not maintain complete data on which of these minorities were interviewed. The stations report that two Hispanics and two Asian-Pacific Islanders were hired for upper-level jobs and two additional Hispanics for lower-level jobs.[15]

25. The NAACP asserts that KTKT/KLPX-FM failed to make meaningful contact with its sources[16] as evidenced by the low number of minority referrals (six) during the reporting year (May 1, 1989, to April 30, 1990), and the low number of minority hires, only two out of 15, for lower level jobs. It concludes that these few minority referrals, "given what may be presumed to be a nearly all white non-affirmative action pool of ... applicants," indicates that minorities had few interviewing and hiring opportunities at the stations.

26. The NHMC also argues that the stations' EEO program is inadequate and that the licensee made "virtually no effort" to recruit minorities, particularly Hispanics. According to the NHMC, KTKT/KLPX-FM has not complied with the FCC's processing guidelines regarding employment of Hispanics, particularly for upper-level jobs. Finally, the NHMC argues that the licensee's failure to propose reforms in its minority recruiting program --despite its lack of Hispanic hiring and few minority referrals -- indicates that KTKT/KLPX-FM failed to conduct any self-assessment, thereby violating our EEO Rule.

27. The licensee of KTKT/KLPX-FM responded in a joint opposition to the petitions of the NAACP and the NHMC. The stations did not specifically address the NAACP's contention that it did not abide by its 1983 proposed EEO program and further develop its recruitment contacts. However, the licensee asserted that, on the whole, it has taken appropriate steps to comply with its EEO-related obligations. Regarding its failure to report minority referrals from its minority and female recruitment sources, including the NAACP, the stations respond that the NAACP never referred anyone to KTKT/KLPX-FM for employment. Moreover, it adds, neither the NAACP nor the NHMC have suggested other organizations as recruitment contacts. The licensee does not address either the NAACP's or the NHMC's charges of low minority hiring rates in the renewal year. It states that it has recently implemented a procedure to maintain data for all vacancies and determine the race, gender and referral source of all applicants.[17]

28. Based on the foregoing, we find no substantial or material questions of fact to warrant a hearing. *See Astroline, supra.* Moreover, we find no evidence in the record of employment discrimination. KTKT/KLPX-FM attracted, interviewed and hired minorities during the three-year review period. Thus, grant of the renewal applications is appropriate.

29. However, the licensee's recruitment efforts to attract qualified minorities were deficient because it failed to recruit so as to attract an adequate pool of minority applicants for at least 66% (18 jobs) of its 27 full-time hires. Our investigation reveals that minorities were included in six (22%) of the 27 overall applicant and interview pools. Also, minorities were included in only four (20%) of the 20 upper-level applicant and interview pools. Thus, minorities were absent from 78% of the overall applicant and interview pools and 80% of the upper-level applicant and interview pools. Notwithstanding the absence of minorities from the applicant and interview pools as noted above, it does not appear that the licensee consistently engaged in efforts to attract minorities or otherwise conducted meaningful self-assessment of its program. In this regard, we are troubled that the majority of KTKT/KLPX-FM's hires resulted from employee or personal referrals and few records

[13] The current license term ended October 1, 1990.

[14] Among the seven minority organizations identified by the licensee were the Pima County Council on Aging, the Boys & Girls Club of Tucson and the YMCA.

[15] KTKT/KLPX-FM is located in the Tucson, Arizona Metropolitan Statistical Area (MSA) which includes 42.4% females and 23.5% minorities (2.5% Black, 18.4% Hispanic, .9% Asian-Pacific Islander and 1.7% American Indian). The licensee's 1984 Annual Employment Report indicated a full-time staff of 29 employees, including five Hispanics (17%). The upper-level staff of 27 employees included three Hispanics (11%). In 1985, KTKT/KLPX-FM reported a full-time of 18 employees, including three Hispanics (17%). On the upper-level staff of 17 employees, the stations included three Hispanics (18%). In 1986, the licensee reported an overall staff of 26 employees, including five Hispanics (19%). Its upper-level staff comprised 25 employees, four of which were Hispanic (16%). The overall staff decreased in 1987 to 22 employees, with four Hispanic (18%) employees reported. The upper-level staff of 21 employees included three (14%) Hispanics. In 1988, the licensee reported 21 full-time employees, including two Hispanics (19%). The upper-level staff of 18 employees included no minorities. In 1989, one Hispanic (5%) and one Asian-Pacific Islander (5%) were reported on a full-time staff of 22 employees. Likewise, one Hispanic (5%) and one Asian-Pacific Islander (5%) were reported on an upper-level staff of 19 employees. Finally, the 1990 Annual Employment Report showed a full-time staff of 24 employees with four minorities: two Hispanics (8%), one Black (4%) and one Asian-Pacific Islander (4%). The upper-level staff of 20 employees included two minorities: one Black (5%) and one Asian-Pacific Islander (5%).

[16] The NAACP states that it received only six job notices from the station in the renewal year. However, there were 15 position vacancies during this period.

[17] The stations request that the Commission consider two post-term minority hires. However, based on the circumstances of the instant case, such consideration is inappropriate. *See* note 8, *supra.*

were available for self-assessment. Therefore, a base forfeiture of $12,500 and reporting conditions are warranted. *See Policy Statement, supra.*

30. Additionally, the licensee's failure to recruit so as to attract an adequate pool of minority applicants for at least 33% of the overall and upper-four full-time positions indicates egregiousness, warranting an upward forfeiture adjustment of $6,250. Also, an upward adjustment of $6,250 is appropriate due to the large number of hiring opportunities (27) during the license term. The combination of the foregoing deficiencies, along with the large minority labor force (23.5%) justifies a further upward adjustment of $6,250, for a total forfeiture of $31,250. Given the number and types of deficiencies noted, a short term renewal is also warranted. *See Policy Statement, supra.*

31. However, we note that KTKT/KLPX-FM hired minorities during the review period from May 1, 1987, to April 30, 1990, at a rate equal to 50% of the minority representation in Tucson. Thus, a $6,250 downward adjustment in the forfeiture is appropriate. *See Policy Statement, supra.* In light of the above, we will issue a Notice of Apparent Liability for $25,000, renew the licenses for a short term and impose reporting conditions.

V. CONCLUSION

32. Upon review of the record, we find that grant of the renewal applications is justified in all cases. However, for Stations KFMS/KFMS-FM and KTKT/KLPX-FM renewal is granted for less than a full term, ending October 1, 1995. To ensure that better efforts are taken with respect to their EEO programs, we will impose reporting conditions on all licensees. Further, by this *Order*, we will issue Notices of Apparent Liability for $18,750 against the licensee of Station KMZQ-FM; $25,000 against the licensee of Stations KFMS/KFMS-FM; and $25,000 against the licensee of Stations KTKT/KLPX-FM.

VI. ORDERING CLAUSES

33. Accordingly, IT IS ORDERED that the Petition to Deny filed by the Idaho/Nevada/Utah State Conference of Branches of the NAACP and its affiliate branches IS DENIED.

34. IT IS FURTHER ORDERED that the Informal Objection filed by the Arizona State Conference of Branches of the NAACP IS DENIED.

35. IT IS FURTHER ORDERED that the Petition to Deny filed by the National Hispanic Media Coalition and its member Richard Martinez against the renewal applications of Arizona Lotus Corporation for renewal of licenses for Stations KTKT/KLPX-FM IS DENIED.

36. IT IS FURTHER ORDERED that the license renewal application for Station KMZQ-FM IS GRANTED, subject to the reporting conditions specified herein, and pursuant to Section 503, a NOTICE OF APPARENT LIABILITY FOR FORFEITURE in the amount of $18,750.

37. IT IS FURTHER ORDERED that the license renewal applications for Stations KFMS/KFMS-FM ARE GRANTED FOR A SHORT TERM ending October 1, 1995, subject to the reporting conditions specified herein, and pursuant to Section 503, a NOTICE OF APPARENT LIABILITY FOR FORFEITURE in the amount of $25,000.

38. IT IS FURTHER ORDERED that the license renewal applications for Stations KTKT/KLPX-FM ARE GRANTED FOR A SHORT TERM ending October 1, 1995, subject to the reporting conditions specified herein, and pursuant to Section 503, a NOTICE OF APPARENT LIABILITY FOR FORFEITURE in the amount of $25,000.

39. IT IS FURTHER ORDERED that the licensees of Stations KMZQ-FM, KFMS/KFMS-FM,[18] and KTKT/KLPX-FM submit to the Commission an original and one copy of the following information on June 1, 1995, June 1, 1996, and June 1, 1997:

(a) For each report, please make two lists divided by full-time and part-time job vacancies during the twelve months preceding the respective reporting dates, indicating the job title and FCC job category, date of hire, the race or national origin, sex and the referral source or each applicant for each job and the race or national origin and sex of the person hired. The list should also note which recruitment sources were contacted;[19]

(b) A list of all employees as of the May 1, 1995, payroll period for the first report and as of the May 1, 1996, and May 1, 1997, payroll periods for the second and third reports by job title and FCC job category, indicating full-time or part-time status (ranked from highest paid classification), date of hire, sex and race or national origin; and

(c) Details concerning the station's efforts to recruit minorities for each position filled during the 12-month periods specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment. In addition, the licensee may submit any information it believes relevant regarding the station's EEO performance and its efforts thereunder.

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[18] Due to the short term renewals ending October 1, 1995, for stations KFMS/KFMS-FM and KTKT/KLPX-FM, we will require only one year of an employment report for both licensees. Therefore, both licensees are to submit an employment report on June 1, 1995.

[19] Such a list might start:

1) News Director: Officials and Managers; Full-time.

3 Applicants:	1 White female	A.W.R.T.
	1 Hispanic male	National Hispanic Media Coalition 1
		Black female NAACP

Sources contacted - Local newspaper, A.W.R.T., National Hispanic Media Coalition and NAACP

Selected - Hispanic male (08/19/91)

40. IT IS FURTHER ORDERED, that the Mass Media Bureau send by Certified Mail – Return Receipt Requested – one copy of this Memorandum Opinion and Order and Notices of Apparent Liability to all parties.

41. The reports are to be filed with the Acting Secretary of the Commission for the attention of the Mass Media Bureau's EEO Branch.

42. Should you have any questions regarding this action or require further information concerning employment reports, you may call the Mass Media Bureau's EEO Branch at (202) 632-7069. With respect to the forfeiture proceeding, the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules, 47 C.F.R. Section 1.80, as summarized in the attachment to this *Order*. Any comments concerning the ability to pay should include those financial items set forth in the attachment.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Concurring Statement of Commissioner James H. Quello

In Re Applications of Midland Broadcasters, Inc. et al.; Lotus Communications, Inc. and University of Southern California; Sun Mountain Broadcasting, Inc.; Commonwealth Broadcasting of Northern California et al.; Buckley Broadcasting Corp. et al.

With some consternation, I face yet again a series of Commission decisions designed to pit Big Brother against industry. With extreme reluctance, I concur in these items, recognizing that, for the most part, a sanction of some sort may be necessary in these cases due to the licensees' failure to comply with our equal employment opportunity rules. Most of these sanctions are against licensees in medium to large markets, where the resources to comply with our EEO rules are, presumably, more readily available than in small markets. In addition, several of the remiss licensees in these cases are located in markets with some of the highest concentrations of minorities in the country, thus providing further justification for sanctions.

Nonetheless, the severity of the sanctions in these cases compel me, yet again, to beseech my colleagues at the Commission to change their focus in ensuring compliance with these very important policies. Compliance could be encouraged -- I think more effectively than by means of harsh punishment -- through use of a "three strikes and you're out" policy. The first violation of our EEO or other rules (except for rules involving safety or intentional rule violations) would result in a warning and imposition of reporting conditions; a second violation would result in a fine and a short-term renewal; a third violation would result in a large fine or designation for hearing.

Another option to encourage, rather than painfully extract, compliance would be to allow broadcasters, as we currently allow common carriers, to settle cases where justified, entering into a consent decree with the Commission that is mutually beneficial to all the parties involved. The Commission would benefit from conserving resources, broadcasters would benefit from gaining prompt disposition of their applications, and minorities would benefit from the funds collected through consent decrees. In the consent decree or other context, I again urge that the Commission use monies collected through enforcement of EEO rules (and other rules as well) for constructive, positive, and practical affirmative purposes. Such purposes could include the funding of programs for educating and training minorities for careers in media, or for funding minority ownership of media properties.

I know that, right now, I am one of the few, but growing, voices for reform of our stepped-up enforcement scheme. But I will continue to be a voice -- persistent, balanced, and increasingly vocal -- supporting an innovative approach to ensuring equal opportunities for minorities. I remain convinced that the best way of ensuring equal opportunities is by working with, rather than against, the very industry that must provide these opportunities.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

Lotus Communications, Inc. — File No. BRH-900801WE

For Renewal of License for
Station KFSD(FM)
San Diego, California

University of Southern California — File No. BRED-900731YO

For Renewal of License for
Station KUSC(FM)
Los Angeles, California

MEMORANDUM OPINION AND ORDER AND NOTICES OF APPARENT LIABILITY

Adopted: April 20, 1994; Released: April 28, 1994

By the Commission: Commissioner Quello concurring and issuing a statement.

I. INTRODUCTION

1. The Commission has before it for consideration: (i) license renewal applications filed for the above-captioned radio stations in California; (ii) a Petition to Deny timely filed on November 1, 1990, by the California State Conference of Branches of the NAACP and various local NAACP branches (collectively "NAACP"), the National Black Media Coalition, the Bay Area Black Media Coalition, and the Los Angeles Black Media Coalition (collectively "NBMC") against the renewal applications of the captioned broadcast stations:[1] (iii) oppositions from the licensees; (iv) the licensees' responses to staff letters of inquiry; and (v) other pleadings.

II. BACKGROUND

2. The NAACP/NBMC allege that the challenged stations violated our Equal Employment Opportunity (EEO) Rule and policies. Accordingly, both organizations request that we conduct an investigation of the stations' employment practices pursuant to *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621 (D.C. Cir. 1978) (*Bilingual*), designate the renewal applications for hearing and, thereafter, deny the applications. The licensees charge that the NAACP/NBMC have presented no evidence of discrimination, that the records indicate compliance with the Commission's EEO Rule, and that unconditional renewal is warranted.

III. PLEADINGS

3. *STANDING.* KFSD(FM) argues that the NAACP/NBMC's pleading should be dismissed for lack of standing because neither organization filed a statement from a member who listens to the station or who is a resident of San Diego. KUSC(FM) challenges the NAACP's pleading and requests its dismissal because it does not support the factual allegations in the pleading with affidavits from individuals with personal knowledge of the station's employment matters. It adds that none of the declarations submitted with the petition refer to KUSC(FM).

4. In challenging an application pursuant to Section 309(d) of the Communications Act, a petitioner must demonstrate party in interest status. In addition, a petitioner must, as a threshold matter, submit, "specific allegations of fact sufficient to show ... that a grant of the application would be *prima facie* inconsistent with [the public interest, convenience and necessity]." 47 U.S.C. § 309(d)(1); *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988) (*Astroline*); *Dubuque T.V. Limited Partnership*, 4 FCC Rcd 1999 (1989). The allegations, except for those of which official notice may be taken, must be supported by the affidavit of a person with knowledge of the facts alleged. 47 U.S.C. § 309(d)(1).

5. Submitted with the NAACP petition is a statement under penalty of perjury from Jose DeSosa, the president of the California State Conference of the NAACP. However, Mr. DeSosa does not state that he is either a listener of the challenged stations or a resident of the service areas. The Commission has previously held that without such assertions, the declaration does not satisfy the standing requirements of the Act. Accordingly, we hold that the NAACP lacks standing to petition the renewal applications for KFSD(FM) and KUSC(FM), and, thus, we will treat its pleading as an informal objection pursuant to 47 C.F.R. § 73.3587. *See Michigan/Ohio Broadcast Renewals*, 3 FCC Rcd 6944 (1988); *see also KDEN Broadcasting Company*, 55 Rad. Reg. 2d (P&F) 1311, 1311-12 (1984).

6. Filed with the petition to deny was an unsigned declaration under penalty of perjury from the chairman of the National Black Media Coalition. He does not claim to be a listener of the challenged stations or a resident of the service areas. Thus, his declaration does not satisfy the standing requirements of the Act. Therefore, we hold that the NBMC lacks standing to petition the renewal application for station KFSD(FM), and we will treat its pleading as an informal objection in accordance with 47 C.F.R. § 73.3587. *See Michigan/Ohio, supra; see also KDEN, supra.*

IV. DISCUSSION

7. *PRIMA FACIE CASE.* The NAACP/NBMC derived their factual allegations from the licensees' EEO programs and annual employment reports. Review of the licensees' EEO records led us initially to conclude that the

[1] We note that the NBMC and its California affiliates do not join in the Petition to Deny insofar as it relates to KUSC(FM). Also, the California affiliates of NBMC do not challenge the renewal application of KFSD(FM). The Petition also includes challenges against other radio stations in California which will be addressed in a separate Commission order.

NAACP/NBMC presented a *prima facie* case against the stations, demonstrating that unconditional grant of the renewal applications would have been inconsistent with the public interest. Section 309(d)(1) of the Communications Act of 1934, 47 U.S.C. § 309(d)(1). *Astroline, supra.*[2] Further inquiry was therefore necessary. *See Beaumont Branch of the NAACP and the National Black Media Coalition v. FCC*, 854 F.2d 501, 506 (D.C. Cir. 1988) (*Beaumont); Bilingual, supra.*

8. Review of the NAACP/NBMC's EEO allegations, as well as the licensees' oppositions and inquiry responses, leads us to conclude that there are no substantial and material questions of fact warranting designation for hearing. In addition, we find no evidence of employment discrimination. Thus, grant of the applications will serve the public interest. 47 U.S.C. § 309(d)(2); *Astroline, supra.* However, we will grant renewal with appropriate remedies and sanctions.

9. Section 73.2080 of the Commission's Rules, 47 C.F.R. 73.2080, requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. When evaluating EEO performance, the Commission focuses on the licensee's efforts to recruit, employ and promote qualified minorities and women and the licensee's ongoing assessment of its EEO efforts. Such an assessment enables the licensee to take corrective action if qualified minorities and women are not present in the applicant pool. The Commission also focuses on any evidence of discrimination by the licensee. *See* Sections 73.2080(b) and (c), 47 C.F.R. Sections 73.2080(b) and 73.2080(c).

10. When the renewal application indicates an absence of discrimination and a record of adequate EEO efforts, the application is granted, if otherwise appropriate. When it fails to evidence a record of adequate EEO efforts, the Commission may impose a variety of sanctions or remedies, such as reporting conditions, renewal for less than a full term, forfeiture, or a combination thereof. Further, the Commission will designate the application for hearing if the facts so warrant. *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987) (*Broadcast EEO), petition for recon. pending; see also* 4 FCC Rcd 1715 (1989)(request for clarification by the National Association of Broadcasters). *See e.g., Beaumont, supra; Bilingual, supra.*

KFSD(FM), San Diego

11. Review of the licensee's renewal application, inquiry response and opposition reveals that KFSD(FM) hired 15 full-time, including 13 upper-level, employees during the three-year review period July 1, 1987, to June 30, 1990.[3] Five of the 15 full-time positions and four of the 13 upper-level full-time positions were filled in the 12-month period prior to the filing of the renewal application.[4] KFSD(FM) states that it bi-annually advises several organizations of its need for qualified minority and female applicants, but it did not indicate that those contacts were for specific positions. Among the 35 recruitment sources used were 12 minority groups, seven women's organizations, five employment services, four newspapers (including two with minority circulations), three educational institutions, three community groups and one trade organization. In its renewal application, the station indicates that for the 12-month period prior to filing the renewal it received 16 minority referrals from these sources: *San Diego Union/Tribune* (5), *El Mexicana* (7), Chicano Federation (1), Mexican American Opportunity Federation (2) and current employees (1). The station provides the following information regarding the referral sources of 14 of its full-time hires: employee referrals (five, including one minority), walk-ins (four), *S.D. Union Newspaper* (two), rehire (one), intra-company transfer (one) and an advertising agency client referral (one).[5]

12. The station explains that it is unable to "supply a list of all referral sources contacted for each position filled, the race of each person interviewed for a position and the number of applications received for each position." However, according to its inquiry response, overall it attracted 296 applicants, including 38 minorities (20 Hispanics, nine Blacks, nine Asian-Pacific Islanders). Two Hispanics were hired (13%), including one for an upper-level vacancy (8%).[6]

13. The NAACP/NBMC argue that KFSD(FM)'s EEO efforts were inadequate and that the licensee has "amassed a record of token minority employment since 1985." They note that the licensee failed to hire a minority for any of the upper-level jobs during the renewal year (*i.e.*, the twelve-month period that precedes renewal of the license, August 1, 1989, to July 31, 1990). Moreover, the

[2] The licensees were not challenged regarding their efforts directed toward women. Nonetheless, as is our practice in all cases, we reviewed the stations' EEO efforts toward women and found them sufficient.

[3] The 15 hires includes an Hispanic female hired for a sales vacancy in October 1990, two months before the license expired and one month prior to the filing of the petition.

[4] The renewal application also reflects two part-time hires.

[5] The licensee did not provide the referral source for the Hispanic hired in October 1990.

[6] KFSD(FM) is located in the San Diego, California Metropolitan Statistical Area (MSA) which includes 43.6% females and 22.6% minorities (4.5% Black, 13.4% Hispanic, 4.1% Asian-Pacific Islander and .6% American Indian). In 1984, KFSD(FM) reported an overall staff of 15 employees, including one Black (7%), one Asian-Pacific Islander (7%), and one American Indian (7%). The same minorities (21%) were reported on the upper-level staff of 14 employees. The licensee's 1985 and 1986 Annual Employment Reports included one American Indian (7%) among 15 full-time employees and one (7%) American Indian on the upper-level staff of 14 employees. The full-time staff decreased to 14 in 1987, and included one American Indian (7%). Likewise, the upper-level staff of 13, included one American Indian (8%). In 1988, the full-time staff grew to 16 employees, including one Asian-Pacific Islander (6%). The upper-level staff of 14 included one Asian-Pacific Islander (7%). The 1989 Annual Employment Report included 15 full-time employees, including one Hispanic (6%) and one Asian-Pacific Islander (6%). The licensee reported an upper-level staff of 13, including one Asian-Pacific Islander (8%). In 1990, KFSD(FM) reported one Hispanic (6%) and one Asian-Pacific Islander (6%) on its overall staff of 15 employees. The station's upper-level staff included one Asian-Pacific Islander (8%) among 12 employees.

NAACP/NBMC fault the licensee for not proposing additional EEO efforts despite attracting only 16 minority applicants predominately from newspaper advertisements.

14. KFSD(FM) responds to the NAACP/NBMC's criticism of token minority employment, stating that it has employed at least one minority during each year of its license term. It adds that due to the small staff size, the loss of one minority employee can affect the station's employment profile and compliance with the Commission's processing guidelines.[7] The licensee does not directly respond to the NAACP/NBMC's complaint regarding minority upper-level hires, but indicates that its EEO efforts have proceeded uninterruptedly and that it has been "somewhat successful" in attracting minorities. KFSD(FM) argues that the NAACP/NBMC have no foundation for its criticism of the licensee's referral sources, including newspapers, and that the NAACP/NBMC do not suggest any recruitment sources that the station failed to use.[8] Lastly, regarding assessment, KFSD(FM) indicates that its corporate vice president reviews EEO policy several times a year to ensure that bi-annual contacts are made with female and minority organizations and notifies the station when its efforts need improvement.

15. Our review of the record discloses no substantial and material questions of fact warranting designation for hearing. *See Astroline, supra.* Nor do we find any evidence of employment discrimination because KFSD(FM) recruited, attracted and hired minorities during the license term. Accordingly, renewal of license is in the public interest.

16. However, we find KFSD(FM)'s overall recruitment efforts deficient because it failed to recruit so as to attract an adequate pool of minority applicants for at least 66% (10 jobs) of its 15 full-time vacancies. The record indicates that minorities were in only two (13%) of the licensee's overall applicant and interview pools. Further, only one (8%) of the 13 upper-level applicant and interview pools included a minority. Hence, it appears that minorities were absent from 87% of the overall applicant and interview pools and 92% of the upper-level applicant and interview pools. Notwithstanding the absence of minorities from the applicant and interview pools as noted above, it does not appear that the licensee consistently engaged in efforts to attract minorities, particularly Hispanics, the dominant minority, or otherwise conducted meaningful self-assessment of its program. In this regard, it is unclear the extent to which the licensee recruited for specific positions or contacted minority sources for specific positions. Moreover, we are troubled by KFSD(FM)'s inability to confirm its license term employment activity due to the absence of adequate record-keeping. Accordingly, a base forfeiture of $12,500 and reporting conditions are warranted. *See Policy Statement*, FCC 94-27 (released January 31, 1994).

17. In addition, the licensee's failure to recruit so as to attract an adequate pool of minority applicants for at least 33% of the overall and upper-level full-time positions renders its EEO efforts egregiously deficient warranting an upward forfeiture adjustment of $6,250. Further, the combination of the above and the location of the stations in an area which includes a large minority labor force (22.6%) justifies an upward adjustment of $6,250. Based on the licensee's overall program deficiencies, a total forfeiture of $25,000 is warranted, along with a short term renewal. *See Policy Statement, supra.*

18. However, we note that the licensee hired minorities during the review period at a rate equal to 50% of the minority representation in San Diego for the period July 1, 1987, to October 1990. Thus, a $6,250 downward adjustment in the forfeiture is appropriate. *See Policy Statement, supra.* Based on the foregoing, we will renew the licenses for a short term, impose reporting conditions and issue a Notice of Apparent Liability for $18,750.

KUSC(FM), Los Angeles

19. Review of the licensee's renewal application, inquiry response and opposition indicates it hired 19 full-time, including 12 upper-level, employees during the three-year review period August 1, 1987, to July 31, 1990. From the station's inquiry response it appears that KUSC(FM) attracted six minority referrals: three from the University of Southern California, one from a minority employee, one from an industry referral, and one from Pacific Public Radio.

20. KUSC(FM) explains that it maintains "systematic communication, both orally and in writing" with sources of qualified minorities and female candidates when positions are posted with the University of Southern California (USC). It states that its recruitment contacts include 24 female and minority organizations, 12 educational institutions, three employment services and three media outlets.[9] The licensee concedes that existing station records do not reflect the number of referrals from recruitment sources, a problem which it attributes to its failure to oversee station personnel properly.[10] KUSC(FM) states that its recruitment sources are contacted by USC and USC Radio Personnel offices. It indicates that most of its applicants are referred by the *Los Angeles Times*, office postings and walk-in applicants. The station provides no applicant flow data; however, it reports 137 interviewees, including 30 minorities for overall job vacancies (17 Blacks, seven Asian-Pacific Islanders, five Hispanics, one American Indian) and 87 upper-level interviewees, including nine minorities (five Blacks, four Asian-Pacific Islanders). Overall, minorities were in 11 of the 19 overall interview pools and five of the 12 upper-level interview pools. Hispanics were in three of the 11 minority inclusive job pools. For its 19 full-time

[7] KFSD(FM) states that the only basis for a challenge to the license renewal is with respect to Hispanics, the dominant minority in the San Diego labor force. It notes that no Hispanic group or person has objected to its renewal application.

[8] KFSD(FM) states that although the NAACP/NBMC deride its use of newspapers as a recruiting tool, the newspaper *El Mexican a*, referred seven minorities in 12 months and the station is not required to use minority-specific sources. Given the Hispanic name of the publication and its probable circulation in predominately Hispanic communities, we view *El Mexicana* as a minority-specific source. We construe the NAACP/NBMC's statement as a challenge to the licensee's use of general circulation newspapers as a primary recruitment source. However, the Commission has not ruled out such general sources as effective for recruiting minorities. *See South Carolina Renewals*, 5 FCC Rcd 1704, 1709 n.8 (1990); *see also, In re WINFAS, et al.*, 5 FCC Rcd 4902 (1990).

[9] KUSC(FM) states that some aspects of its EEO program emphasize Hispanics because they are the largest minority group in the area. We discerned 10 Hispanic organizations among the licensee's 42 recruitment sources.

[10] A new recruitment program, implemented by the licensee on December 1, 1990 (the expiration date of the current license term), portends to address EEO program accountability.

jobs. KUSC(FM) hired six minorities (three Blacks, one American Indian, one Hispanic, one Asian-Pacific Islander), including three minorities for upper-level positions (two Blacks, one Asian-Pacific Islander).[11]

21. Calling KUSC(FM)'s 1990 EEO program inadequate "on its face," the NAACP asserts that the licensee has no excuse for its years of marginal EEO performance. The NAACP notes that KUSC(FM) is a large station (*see* note 11, *supra)* which has experienced a high turnover and that there is no shortage of well-qualified minorities in Los Angeles to perform any job in communications. It criticizes the station for several omissions in its renewal application: 1) failing to report specific minority referrals; 2) neglecting to make visual observations of its referrals; and 3) omitting the specific number of female applicants for its job vacancies. The NAACP argues that the station's stated reasons for its minority recruitment difficulties, which KUSC(FM) has attributed to its classical format and competition from other stations in the market, reflect a "stereotyped, backward view of minorities in the media," which, according to the NAACP, is the real reason so few minorities are employed at KUSC(FM).

22. KUSC(FM) responds that the NAACP has provided no specifics to support its charge that the station's EEO program is inadequate "on its face." Regarding the lack of specificity in its renewal application, the licensee states that its new record-keeping procedures should correct the problem of inadequate oversight of its personnel staff. The station acknowledges that it has experienced high turnover since its 1988 change to a classical format, but denies that its employment policies are the result of racial stereotyping and tokenism.[12] KUSC(FM) states that other area employers pay more and it is difficult to compete with motion picture studios, commercial broadcasters and newspapers. Also, according to the licensee, the change in format "narrowed the field of eligible candidates for our on-air and support staff even more."[13] KUSC(FM) indicated that the discrepancy between the percentage of minorities in the labor force and its employment profile is due to those limiting factors.[14] The station added that it was dissatisfied with the progress of its EEO program and implemented new recruitment and record-keeping measures on December 1, 1990.

23. Our review of the record discloses no substantial and material questions of fact warranting designation for hearing. *See Astroline, supra.* We also find no evidence of discrimination. During the three-year review period, KUSC(FM) attracted, interviewed and hired minorities. Therefore, renewal of the license is in the public interest.

24. However, we find KUSC(FM)'s overall recruitment efforts deficient because it failed to recruit so as to attract an adequate pool of minority applicants for at least 66% (13 jobs) of its 19 full-time positions. Although the licensee did not maintain applicant pool data, the record indicates that minorities were in 11 (58%) of the licensee's interview pools. Thus, it appears minorities were absent from 42% of the interview pools. Notwithstanding the absence of minorities from the interview pools as noted above, it does not appear that the licensee consistently engaged in efforts to attract minorities or otherwise conducted meaningful self-assessment of its program.[15] Although KUSC(FM) stated that some aspects of its program emphasize Hispanics (24.4% of the Los Angeles-Long Beach MSA), the record evidences inadequate efforts toward the MSA's dominant

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[11] We note that the six minority hires occurred in the renewal year of the license term (August 1, 1989, to July 31, 1990). KUSC(FM) is located in the Los Angeles-Long Beach, California MSA which includes 42.8% females and 41.9% minorities (10.8% Black, 24.4% Hispanic, 6.1% Asian-Pacific Islander, .6% American Indian). In 1990, the Annual Employment Report included an overall staff of 43 employees including five Blacks (12%) and three Hispanics (7%). The upper-level staff of 39 employees included five Blacks (13%) and one Hispanic (3%). In 1989, the staff comprised 36 full-time employees, including three Blacks (8%), three Hispanics (8%) and one Asian-Pacific Islander (3%). Three Blacks (9%), two Hispanics (6%) and one Asian-Pacific Islander (3%) were among the 32 upper-level employees. The 1988 full-time staff of 40 employees included three Blacks (8%), five Hispanics (13%) and one Asian-Pacific Islander (3%). Included on the upper-level staff of 33 employees were two Blacks (6%), two Hispanics (6%) and one Asian-Pacific Islander (3%). In 1987, among 45 full-time employees, the licensee employed four Blacks (9%), five Hispanics (11%), and one Asian-Pacific Islander (2%). The upper-level staff of 38 employees included two Blacks (5%), two Hispanics (5%) and one Asian-Pacific Islander (3%). The 1986 Annual Employment Report included 42 full-time employees, including five Blacks (12%), five Hispanics and one Asian-Pacific Islander (2%). Two Blacks (6%) and one Hispanic (3%)h) were among the 33 upper-level employees. In 1985, the staff of 40 overall employees included five Blacks (12%) and five Hispanics (12%). The upper-level staff of 33 employees included three Blacks (9%) and one Hispanic (3%). The 1984 Annual Employment Report included 34 employees among them, three Blacks (9%), one Hispanic (3%) and one Asian-Pacific Islander (3%). The upper-level staff of 28 included three Blacks (11%).

[12] The NAACP charges that these reasons are unacceptable because "the station could have fulfilled its EEO obligations with off-air positions," if KUSC(FM) could not attract qualified minorities for its classical announcing positions. Moreover, the NAACP asserts that there are more broadcast applicants in the Los Angeles area than there are jobs -- a fact which tends to favor the broadcast employer.

[13] In 1984, based on the previous renewal period, KUSC(FM) was admonished "to constantly evaluate the make-up of applicant referrals from the various sources used, and to find new ones if there is an inadequate flow of qualified minorities or women." *See* Letter from Glenn A. Wolfe, Chief, EEO Branch, to Dr. Wallace A. Smith, University of Southern California, January 27, 1984. At that time, we admonished the station regarding its lack of attention to -- among other details -- Hispanic recruitment. Then, as now, the licensee attributed the insufficient number of qualified Hispanic applicants to its classical format and salary limitations. Again, we find no merit to these arguments. The Commission has long held that broadcast formats do not relieve licensees from their EEO responsibilities. *Leflore Broadcasting, Inc. v. FCC*, 66 FCC 2d 734, 784-85 (1985). As for salary limitations, those competitive factors affect minorities and nonminorities equally.

[14] The station indicates that its recent recruitment is better than its records support, in part because in 1990 it acquired the "Marketplace" program which had no minorities and, consequently, adversely affected what the station deemed an otherwise improving employment profile.

[15] Although KUSC(FM) presented modifications to address program deficiencies regarding assessment, such modifications were not effective during the subject license term and are not considered herein. *See Rust*, 73 FCC 2d 39, 52 (1979); *Office of Communication of the United Church of Christ v. FCC*, 359 F. 2d 994, 1007 (D.C. Cir. 1966); *cf. National Black Media Coalition v. FCC*, 775 F.2d 342 (D.C. Cir. 1985).

minority group. Moreover, it appears that complete applicant flow data was either lost or never maintained. Accordingly, a base forfeiture of $12,500 and reporting conditions are warranted. *See Policy Statement, supra.*

25. In addition, the location of the station in an area which includes a large minority labor force (41.9%) warrants an upward forfeiture adjustment of $11,250. Based on the licensee's overall program deficiencies, a total forfeiture of $23,750, as well as reporting conditions is appropriate.

26. However, we note that the licensee hired minorities during the review period at a rate equal to 50% of the minority representation in the Los Angeles-Long Beach MSA for the period August 1, 1987, to July 31, 1990. Thus, a $6,250 downward adjustment in the forfeiture is appropriate. *See Policy Statement, supra.* Based on the foregoing, we will renew the license subject to reporting conditions and issue a Notice of Apparent Liability for $17,500.

V. CONCLUSION

27. Upon review of the record, we find that grant of the renewal applications is in the public interest. The license for KFSD(FM) is renewed for less than a full term subject to reporting conditions and issuance of a Notice of Apparent Liability for $18,750. We will renew the license for KUSC(FM) subject to reporting conditions and issue a Notice of Apparent Liability for $17,500.

VI. ORDERING CLAUSES

28. Accordingly, IT IS ORDERED that the informal objections filed by the California State Conference of Branches of the NAACP and its affiliate branches, and the National Black Media Coalition against the renewal application for Station KFSD(FM) ARE DENIED.

29. IT IS FURTHER ORDERED that the informal objection filed by the California State Conference of Branches of the NAACP and its affiliate branches against the renewal application for Station KUSC(FM) IS DENIED.

30. IT IS FURTHER ORDERED that the license renewal application for Station KFSD(FM) IS GRANTED FOR A SHORT TERM ending December 1, 1995, subject to the reporting conditions specified herein, and pursuant to Section 503, a NOTICE OF APPARENT LIABILITY FOR FORFEITURE in the amount of $18,750.

31. IT IS FURTHER ORDERED that the license renewal application for Station KUSC(FM) IS GRANTED subject to the reporting conditions specified herein, and pursuant to Section 503, a NOTICE OF APPARENT LIABILITY FOR FORFEITURE in the amount of $17,500.

32. IT IS FURTHER ORDERED that the licensees of Stations KFSD(FM)[16] and KUSC(FM) submit to the Commission an original and one copy of the following information on August 1, 1995, August 1, 1996, and August 1, 1997:

(a) For each report, please make two lists divided by full-time and part-time job vacancies during the twelve months preceding the respective reporting dates, indicating the job title and FCC job category, date of hire, the race or national origin, sex and the referral source of each applicant for each job and the race or national origin and sex of the person hired. The list should also note which recruitment sources were contacted;[17]

(b) A list of all employees as of the July 1, 1995, payroll period for the first report and as of the July 1, 1996, and July 1, 1997, payroll periods for the second and third reports by job title and FCC job category, indicating full-time or part-time status (ranked from highest paid classification), date of hire, sex and race or national origin; and

(c) Details concerning the station's efforts to recruit minorities for each position filled during the 12-month periods specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment. In addition, the licensee may submit any information it believes relevant regarding the station's EEO performance and its efforts thereunder.

33. IT IS FURTHER ORDERED, that the Mass Media Bureau send by Certified Mail -- Return Receipt Requested -- one copy of this Memorandum Opinion and Order and Notice of Apparent Liability to all parties.

34. The reports are to be filed with the Acting Secretary of the Commission for the attention of the Mass Media Bureau's EEO Branch.

35. Should you have any questions regarding this action or require further information concerning employment reports, you may call the Mass Media Bureau's EEO Branch at (202) 632-7069. With respect to the forfeiture proceeding, the licensee may take any of the actions set forth in Section 1.80, as summarized in the attachment to this Order. Any comments concerning the ability to pay should include those financial items set forth in the attachment.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[16] Due to the short term renewal ending December 1, 1995, for station KFSD(FM), we will require only one year of an employment report. Therefore, the licensee is to submit an employment report on August 1, 1995.

[17] Such a list might start:

1) News Director; Officials and Managers; Full-time.

3 Applicants:	1 White female	A.W.R.T
	1 Hispanic male	National Hispanic Media Coalition
	1 Black female	NAACP

Sources contacted - Local newspaper, A.W.R.T., National Hispanic Media Coalition and NAACP

Selected - Hispanic male (08/19/93)

Concurring Statement of Commissioner James H. Quello

In Re Applications of Midland Broadcasters, Inc. et al.; Lotus Communications, Inc. and University of Southern California; Sun Mountain Broadcasting, Inc.; Commonwealth Broadcasting of Northern California et al.; Buckley Broadcasting Corp. et al.

With some consternation, I face yet again a series of Commission decisions designed to pit Big Brother against industry. With extreme reluctance, I concur in these items, recognizing that, for the most part, a sanction of some sort may be necessary in these cases due to the licensees' failure to comply with our equal employment opportunity rules. Most of these sanctions are against licensees in medium to large markets, where the resources to comply with our EEO rules are, presumably, more readily available than in small markets. In addition, several of the remiss licensees in these cases are located in markets with some of the highest concentrations of minorities in the country, thus providing further justification for sanctions.

Nonetheless, the severity of the sanctions in these cases compel me, yet again, to beseech my colleagues at the Commission to change their focus in ensuring compliance with these very important policies. Compliance could be encouraged -- I think more effectively than by means of harsh punishment -- through use of a "three strikes and you're out" policy. The first violation of our EEO or other rules (except for rules involving safety or intentional rule violations) would result in a warning and imposition of reporting conditions; a second violation would result in a fine and a short-term renewal; a third violation would result in a large fine or designation for hearing.

Another option to encourage, rather than painfully extract, compliance would be to allow broadcasters, as we currently allow common carriers, to settle cases where justified, entering into a consent decree with the Commission that is mutually beneficial to all the parties involved. The Commission would benefit from conserving resources, broadcasters would benefit from gaining prompt disposition of their applications, and minorities would benefit from the funds collected through consent decrees. In the consent decree or other context, I again urge that the Commission use monies collected through enforcement of EEO rules (and other rules as well) for constructive, positive, and practical affirmative purposes. Such purposes could include the funding of programs for educating and training minorities for careers in media, or for funding minority ownership of media properties.

I know that, right now, I am one of the few, but growing, voices for reform of our stepped-up enforcement scheme. But I will continue to be a voice -- persistent, balanced, and increasingly vocal -- supporting an innovative approach to ensuring equal opportunities for minorities. I remain convinced that the best way of ensuring equal opportunities is by working with, rather than against, the very industry that must provide these opportunities.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

Sun Mountain Broadcasting, Inc. — File Nos. BR - 900530YW, BRH - 900530ZF

For Renewal of Licenses for Stations KISN/KISN-FM[1]
Salt Lake City, Utah

MEMORANDUM OPINION AND ORDER AND NOTICE OF APPARENT LIABILITY

Adopted: April 20, 1994; Released: April 28, 1994

By the Commission: Commissioner Quello concurring and issuing a statement.

I. INTRODUCTION

1. The Commission has before it for consideration: (i) license renewal applications filed by Sun Mountain Broadcasting, Inc., for stations KISN/KISN-FM,[2] Salt Lake City, Utah; (ii) a Petition to Deny timely filed on September 4, 1990, by the Idaho/Nevada/Utah State Conference of Branches of the NAACP and by various local NAACP branches (collectively "NAACP") against the renewal applications of these broadcast stations;[3] (iii) an opposition to the petition to deny filed by the licensee; and (iv) the licensee's responses to staff letters of inquiry.

II. BACKGROUND

2. The NAACP alleges that the challenged stations violated our Equal Employment Opportunity (EEO) Rule and policies. Accordingly, it requests that we conduct an investigation of KISN/KISN-FM's employment practices pursuant to *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621 (D.C. Cir. 1978) (*Bilingual*). The NAACP also requests that the Commission designate the renewal applications for hearing and deny the applications. The licensee charges that the NAACP has presented no evidence of discrimination, that the records indicate compliance with the Commission's EEO Rule, and that unconditional renewal is warranted.

III. PLEADINGS

3. *STANDING*. In challenging an application pursuant to Section 309(d) of the Communications Act, a petitioner must demonstrate party in interest status. In addition, a petitioner must, as a threshold matter, submit "specific allegations of fact sufficient to show ... that a grant of the application would be *prima facie* inconsistent with [the public interest, convenience and necessity]." 47 U.S.C. § 309(d)(1); *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988) (*Astroline*); *Dubuque T.V. Limited Partnership*, 4 FCC Rcd 1999 (1989). The allegations, except for those of which official notice may be taken, must be supported by the affidavit of a person with personal knowledge of the facts alleged. 47 U.S.C. § 309(d)(1).

4. Submitted with the petition to deny was a declaration under penalty of perjury from the President of the Salt Lake City Branch of the NAACP, indicating that she listens to Stations KISN/KISN-FM. Accordingly, we hold that the Idaho/Nevada/Utah State Conference of Branches of the NAACP and its Salt Lake City affiliate branch have satisfied the requirements for standing. *American Legal Foundation v. FCC*, 808 F.2d 84 (D.C. Cir. 1987); *see also, Petition for Rule Making to Establish Standards for Determining the Standing of a Party to Petition to Deny a Broadcast Application*, 82 FCC 2d 89 (1980) (citing *Warth v. Seldin*, 422 U.S. 490, 511 (1975)).

IV. DISCUSSION

5. *PRIMA FACIE CASE*. The NAACP derived its factual allegations from the licensee's EEO program and annual employment reports. Review of the licensee's EEO records led us initially to conclude that the NAACP presented a *prima facie* case against the two stations, demonstrating that unconditional grant of the renewal applications would have been inconsistent with the public interest. *See* Section 309(d)(1) of the Communications Act of 1934, 47 U.S.C. § 309(d)(1). *Astroline, supra*.[4] Further inquiry was therefore necessary. *See Beaumont Branch of the NAACP and the National Black Media Coalition v. FCC*, 854 F.2d 501, 506 (D.C. Cir. 1988) (*Beaumont*); *Bilingual Bicultural Coalition v. FCC*, 595 F.2d 621 (D.C. Cir. 1978) (*Bilingual*).

6. However, subsequent review of the NAACP's EEO allegations, as well as the licensee's renewal applications, opposition and inquiry responses, leads us to conclude that there are no substantial and material questions of fact warranting designation for hearing. In addition, we find no evidence of employment discrimination. Thus, grant of the applications will serve the public interest. 47 U.S.C. § 309(d)(2); *Astroline, supra*. Accordingly, we will grant renewal, but with appropriate remedies and sanctions.

7. Section 73.2080 of the Commission's Rules, 47 C.F.R. 73.2080, requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continu-

[1] On May 15, 1989, the stations' call signs were changed from KLUB(AM)/KISN to KISN/KISN-FM. In this *Order* we will refer to the stations by the new call signs.

[2] On July 8, 1985, the Commission granted the assignment of licenses for KISN/KISN-FM from Carman Corporation to Sun Mountain Broadcasting, Inc. The assignment was consummated on August 1, 1985. The license term under review ended on October 1, 1990.

[3] The Petition to Deny also included challenges against other radio stations in Arizona and Nevada. They will be addressed in separate Commission orders.

[4] The licensee was not challenged regarding its efforts directed toward women. Nonetheless, as is our practice in all cases, we reviewed each station's EEO efforts toward women and found them sufficient.

ing efforts to recruit, employ and promote qualified women and minorities. When evaluating EEO performance, the Commission focuses on the licensee's efforts to recruit, employ and promote qualified minorities and women and the licensee's ongoing assessment of its EEO efforts. Such an assessment enables the licensee to take corrective action if qualified minorities and women are not present in the applicant pool. The Commission also focuses on any evidence of discrimination by the licensee. *See* Sections 73.2080(b) and (c) of the Commission's Rules, 47 C.F.R. Sections 73.2080 (b) and 73.2080 (c).

8. When the renewal application indicates an absence of discrimination and a record of adequate EEO efforts, the application is granted, if otherwise appropriate. When it fails to evidence a record of adequate EEO efforts, the Commission may impose a variety of sanctions or remedies, such as reporting conditions, renewal for less than a full term, forfeiture, or a combination thereof. Further, the Commission will designate the application for hearing if the facts so warrant. *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987) (*Broadcast EEO), petition for recon. pending; see also* 4 FCC Rcd 1715 (1989) (request for clarification by the National Association of Broadcasters). *See e.g., Beaumont, supra; Bilingual, supra.*

9. Review of the licensee's renewal applications, inquiry responses and opposition reveals that during the period April 1, 1987, through March 31, 1990, the licensee had 13 full-time hiring opportunities, all for upper-level positions. To recruit for these positions, the licensee used the following general and minority sources:[5] the Utah Job Service, local radio stations, employee referrals, Hispanic Affairs Office,[6] internal postings, walk-in applicants, NAACP, YWCA/Women In Jeopardy, and Women's Resource Center.[7] The licensee did not report any minority referrals from its recruitment sources for the 13 full-time positions. It appears that the licensee used from two to five of its recruitment sources, plus walk-in applicants, internal job postings, and employee referrals, to fill 12 jobs. The licensee did not recruit for the thirteenth vacancy. The licensee reported 93 applicants and 93 interviewees. Only one minority, a Black male walk-in, applied, and was interviewed for, an upper-level position.[8] No minorities were hired for the 13 full-time job openings which arose during the three-year reporting period.[9]

10. The NAACP criticizes the licensee for not adhering to the EEO program outlined in its 1985 assignment applications. According to the NAACP, the licensee promised use of the Division of Indian Affairs, the NAACP, the Governor's Black Advisory Council, and the Weber Council of Spanish Speaking Organizations. Notwithstanding its extensive minority recruitment list, NAACP argues that the licensee's record never evidenced meaningful contact with any of those sources. It adds that, although the licensee had three interns as a result of its college internship programs, none were minority. Lastly, the NAACP asserts that the licensee reported no minority hires and only one minority applicant in the renewal year, *i.e.*, April 1, 1989, to March 31, 1990.

11. The licensee responds that it regularly contacted a substantial number of minority and women's organizations to locate qualified applicants. It adds that, although the NAACP was one of its recruitment contacts, the NAACP never referred applicants to the stations. Regarding the NAACP's assertions that its internship program does not include minorities, the licensee states that minorities comprise only five percent of the college students in Utah. The licensee does not respond directly to the NAACP's charges of low applicant flow and the absence of minority hires in the renewal year. However, it does point out that the NAACP fails to acknowledge the "small minority population in the Salt Lake City MSA and the consequent difficulties in recruiting and hiring qualified minorities." Although the licensee considers its recruitment efforts, "an aggressive program of EEO practices," KISN/KISN-FM states that its program has not produced a higher percentage of minority employees due to the small minority representation in the Salt Lake City labor force.[10] The licensee further asserts that its minority recruitment efforts are

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[5] While the licensee attempted to identify which sources were used for each job vacancy, the record indicates some uncertainty by the stations about its recruitment contacts for the 13 positions. In its inquiry response, the licensee states that its list of recruitment sources circulates to all department heads who are responsible for hiring. Although the managers are instructed to contact each source for each vacancy, the licensee states that it cannot confirm whether that procedure was followed.

[6] The licensee contacted this Hispanic source in the first and last years of the three-year review period (1987, 1990)). Apparently, no minorities were referred for any jobs, although it appears that the licensee contacted the Hispanic Affairs Office for five jobs. Notwithstanding the lack of Hispanic referrals, the licensee failed to contact Hispanic organizations more diligently. Overall, minority-specific sources were contacted for seven vacancies.

[7] Additional sources were tentatively identified by the licensee, but it could not confirm that they were actually contacted.

[8] In its renewal applications, the licensee states that KISN/KISN-FM broadcasts Utah Jazz basketball games, as well as a sports talk program, 52 weeks per year. It indicates that in May 1989, a Black male was hired as a full-time co-host of the broadcasts. The licensee further states that "although the black male is not technically on the KISN payroll" (the Utah Jazz pays his salary), he reports to the stations, works from the stations' studios and "is in effect no different from other KISN announcers." Our EEO Rule pertains only to employees of broadcast licensees. To be considered an employee, the individual must be on the licensee's payroll. *See* 47 C.F.R. § 73.2080; *see also* Instructions for Completion of FCC Form 395-B Broadcast Station Annual Employment Report. Hence, regardless of the working arrangement for the Black announcer, the licensee does not pay his salary and we cannot consider him an employee of KISN/KISN-FM.

[9] KISN/KISN-FM is located in the Salt Lake City-Ogden Metropolitan Statistical Area (MSA) which includes 40.8% females and 7.5% minorities (.8% Blacks, 4.5% Hispanic, 1.7% Asian-Pacific Islander, .5% American Indian). From 1985, when it acquired the license, to 1990, the licensee reported from 21 to 35 overall employees and from 18 to 31 upper-level employees. The licensee reported a minority (American Indian) on its staff in only one year, 1989, for a lower level position. Pursuant to a Commission staff inquiry, the licensee indicated that the employee classified as an American Indian was originally considered and hired as a white female. In 1989, the licensee discerned that this employee was also of American Indian extraction. However, KISN/KISN-FM resumed classifying her as white in 1990, and states that it will continue to do so on future annual employment reports.

[10] The licensee argues that no single minority group represents as much as 5% of the Salt Lake City labor force, which it states is the minimum level of minority representation necessary to

hampered by the fact that a substantial percentage of the area's minorities are employed in manufacturing and are not likely candidates for broadcast employment. The licensee also explains that only 52% of Hispanics aged 25 and older have a high school diploma which is a requirement for most of the stations' jobs.[11]

12. Our review of the record discloses no substantial and material questions of fact warranting designation for hearing. *See Astroline, supra.* The licensee engaged in some recruitment efforts and interviewed a minority applicant for an upper-level vacancy. In addition, we find no evidence of employment discrimination. Therefore, grant of the renewal is in the public interest.

13. However, the licensee's recruitment efforts were deficient. Specifically, it failed to recruit so as to attract an adequate pool of minority applicants for at least 66% (9 jobs) of its 13 full-time vacancies. The record revealed that minorities were included in only one (7.6%) of the licensee's overall and upper-level applicant and interview pools. Thus, minorities were absent from 92.4% of the overall and upper-level pools. Notwithstanding the absence of minorities from the applicant and interview pools as noted above, it does not appear that the licensee consistently engaged in efforts to attract minorities, particularly Hispanics, the dominant minority in the labor force here, or otherwise conducted meaningful self-assessment of its program. In this regard, although the licensee recruited for 12 of its 13 full-time positions, it used minority-specific sources for only seven (58%) of those recruited vacancies, and reported no minority referrals. Despite the dearth of minority referrals from its general and minority-specific sources, the licensee did not identify new recruitment organizations, or otherwise modify its efforts. Accordingly, a base forfeiture of $12,500 and reporting conditions are appropriate. *See Policy Statement,* FCC 94-27 (released January 31, 1994).

14. In addition, the licensee's failure to recruit so as to attract an adequate pool of minority applicants for at least 33% of the overall and upper-four full-time positions indicates egregiousness, warranting an upward forfeiture adjustment of $6,250. Therefore, we will renew the licenses subject to reporting conditions and issue a Notice of Apparent Liability for $18,750.

V. CONCLUSION

15. Upon review of the record and the arguments submitted by all parties, we find no hearings are warranted and that renewal of the licenses is appropriate. However, renewal is subject to reporting conditions and issuance of a Notice of Apparent Liability for $18,750.

VI. ORDERING CLAUSES

16. Accordingly, IT IS ORDERED that the Petition to Deny filed by the Idaho/Nevada/Utah State Conference of Branches of the NAACP and its affiliate branches IS DENIED.

17. IT IS FURTHER ORDERED that the license renewal applications for KISN/KISN-FM ARE GRANTED subject to the reporting conditions specified herein, and pursuant to Section 503, a NOTICE OF APPARENT LIABILITY FOR FORFEITURE in the amount of $18,750.

18. IT IS FURTHER ORDERED that the licensee of Stations KISN/KISN-FM submit to the Commission an original and one copy of the following information on June 1, 1995, June 1, 1996, and June 1, 1997:

(a) For each report, please make two lists divided by full-time and part-time job vacancies during the twelve months preceding the respective reporting dates, indicating the job title and FCC job category, date of hire, the race or national origin, sex and the referral source of each applicant for each job and the race or national origin and sex of the person hired. The list should also note which recruitment sources were contacted;[12]

(b) A list of all employees as of the May 1, 1995, payroll period for the first report and as of the May 1, 1996, and May 1, 1997, payroll periods for the second and third reports by job title and FCC job category, indicating full-time or part-time status (ranked from highest paid classification), date of hire, sex and race or national origin; and

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trigger EEO program obligations. The licensee is not relieved of EEO compliance, however, because overall minority representation in the Salt Lake City labor force is more than five percent in the aggregate. *See Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services,* 2 FCC Rcd 3967 (1987), *petition for recon. pending; see also* 4 FCC Rcd 1715 (1989) (request for clarification by the National Association of Broadcasters). Moreover, an EEO program is mandated for women, who comprise 40.8% of the labor force. *Id. See also* Broadcast Equal Employment Opportunity Program Report, Form 396, Filing Instructions.

[11] These factors, the difficulties in attracting Hispanic high school graduates and Hispanics skilled in broadcasting, apparently are considered impediments by the licensee to its recruitment efforts. The licensee argues that the Supreme Court in *Wards Cove Packing Co. v. Antonio,* 109 S. Ct. 2115 (1989)(*Wards Cove*) ruled that "such factors (*i.e.*, comparison between the racial composition of the qualified persons in the labor market and the persons holding at-issue jobs) must be considered in statistical evaluations of station employment." As the Commission stated in *Petition for Rule Making to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices - Memorandum Opinion and Order and Notice of Proposed Rule Making,* 13 FCC 2d 766, 767 (1968) (NPRM), our EEO responsibilities flow not from Title VII but from the Communications Act, 47 U.S.C. Sections 307 (a) and (d) and 309 (a), which requires the Commission to grant broadcast license applications only after finding that the "public interest, convenience and necessity" would be served thereby. *See South Carolina,* 5 FCC Rcd 1704, 1709 n.4 (1990); *WXBM-FM,* 6 FCC Rcd 4782, 4786 n.13 (1991); *Ogden Broadcasting,* 7 FCC Rcd 1895 (1992). In adhering to this policy, we find that *Wards Cove* does not limit our analysis of a licensee's efforts to attract minority applicants.

[12] Such a list might start:

1) News Director: Officials and Managers; Full-time.

3 Applicants:	1 White female	A.W.R.T.
	1 Hispanic male	National Hispanic Media Coalition
	1 Black female	NAACP

Sources contacted - Local newspaper, A.W.R.T., National Hispanic Media Coalition and NAACP

Selected - Hispanic male (08/19/94)

(c) Details concerning the station's efforts to recruit minorities for each position filled during the 12-month periods specified, including identification or sources used and indicating whether any of the applicants declined actual offers of employment. In addition, the licensee may submit any information it believes relevant regarding the station's EEO performance and its efforts thereunder.

19. IT IS FURTHER ORDERED, that the Mass Media Bureau send by Certified Mail – Return Receipt Requested -- one copy of this Memorandum Opinion and Order and Notice of Apparent Liability to all parties.

20. The reports are to be filed with the Acting Secretary of the Commission for the attention of the Mass Media Bureau's EEO Branch.

21. Should you have any questions regarding this action or require further information concerning employment reports, you may call the Mass Media Bureau's EEO Branch at (202) 632-7069. With respect to the forfeiture proceeding, the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80, as summarized in the attachment to this Order. Any comments concerning the ability to pay should include those financial items set forth in the attachment.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Concurring Statement of Commissioner James H. Quello

In Re Applications of Midland Broadcasters, Inc. et al.; Lotus Communications, Inc. and University of Southern California; Sun Mountain Broadcasting, Inc.; Commonwealth Broadcasting of Northern California et al.; Buckley Broadcasting Corp. et al.

With some consternation, I face yet again a series of Commission decisions designed to pit Big Brother against industry. With extreme reluctance, I concur in these items, recognizing that, for the most part, a sanction of some sort may be necessary in these cases due to the licensees' failure to comply with our equal employment opportunity rules. Most of these sanctions are against licensees in medium to large markets, where the resources to comply with our EEO rules are, presumably, more readily available than in small markets. In addition, several of the remiss licensees in these cases are located in markets with some of the highest concentrations of minorities in the country, thus providing further justification for sanctions.

Nonetheless, the severity of the sanctions in these cases compel me, yet again, to beseech my colleagues at the Commission to change their focus in ensuring compliance with these very important policies. Compliance could be encouraged -- I think more effectively than by means of harsh punishment -- through use of a "three strikes and you're out" policy. The first violation of our EEO or other rules (except for rules involving safety or intentional rule violations) would result in a warning and imposition of reporting conditions; a second violation would result in a fine and a short-term renewal; a third violation would result in a large fine or designation for hearing.

Another option to encourage, rather than painfully extract, compliance would be to allow broadcasters, as we currently allow common carriers, to settle cases where justified, entering into a consent decree with the Commission that is mutually beneficial to all the parties involved. The Commission would benefit from conserving resources, broadcasters would benefit from gaining prompt disposition of their applications, and minorities would benefit from the funds collected through consent decrees. In the consent decree or other context, I again urge that the Commission use monies collected through enforcement of EEO rules (and other rules as well) for constructive, positive, and practical affirmative purposes. Such purposes could include the funding of programs for educating and training minorities for careers in media, or for funding minority ownership of media properties.

I know that, right now, I am one of the few, but growing, voices for reform of our stepped-up enforcement scheme. But I will continue to be a voice -- persistent, balanced, and increasingly vocal -- supporting an innovative approach to ensuring equal opportunities for minorities. I remain convinced that the best way of ensuring equal opportunities is by working with, rather than against, the very industry that must provide these opportunities.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

UPSOUTH CORPORATION	File No. 13084-CF-AL-94
BAY AREA TELEPORT, INC.	File No. 13085-CF-AL-94
MTEL DIGITAL SERVICES, INC.	File No. 13082-CF-AL-94

For Commission consent to the assignment of authorizations in the Point-to-Point Microwave Radio Service to Pacific & Eastern Digital Transmission Services, Inc.

MEMORANDUM OPINION AND ORDER

Adopted: April 29, 1994; Released: April 29, 1994

By the Chief, Domestic Facilities Division:

INTRODUCTION

1. Before us are the captioned applications for assignment of stations in the Point-to-Point Microwave Radio Service from Upsouth Corporation (Upsouth), Bay Area Teleport, Inc. (Bay Area), and Mtel Digital Services, Inc. (Mtel) to Pacific and Eastern Digital Transmission Services, Inc. (Pacific & Eastern), a wholly-owned subsidiary of Teleport Transmission Holdings, Inc. (TTH). The applications were placed on public notice as accepted for filing on December 22, 1993. No responsive pleadings have been filed.

2. Pacific & Eastern is a newly formed entity incorporated under the laws of Colorado. Its directors are all United States citizens.[1] Pacific & Eastern's sole stockholder is Teleport Transmission Holdings, Inc. (TTH). TTH is also a Colorado corporation. There are four directors of TTH: Messrs. Glaser, Brandenburg, and Burge, all U.S. citizens, and Mr. Becker, a Canadian citizen.

3. TTH at present is a wholly-owned subsidiary of IntelCom Group (U.S.A.), Inc., which is a subsidiary of IntelCom Group Inc. IntelCom Group is owned by Mr. William W. Becker, a Canadian citizen.

BACKGROUND

4. The Commission has previously ruled on assignment of common carrier stations to assignee's parent company. In *Teleport Transmission Holdings, Inc.*, File No. I-T-C-92-036-T/C-161-DSE-TC-92(2), 8 FCC Rcd 3063 (1993), the Commission granted to TTH authority to acquire Teleport Transmission Company, which held existing and prospective satellite earth stations, subject to the fulfillment of three conditions.[2] The conditions have not been fulfilled. In the instant proceeding, parties propose, instead, an alternate ownership structure which, they argue, is substantially the same as that required in the *TTH Order*.

5. Parties propose that Messrs. Glaser and Becker purchase TTH from IntelCom Group. The ultimate owners of TTH would then be two shareholders: the majority (60%) shareholder would be Mr. Becker, a Canadian citizen, and the remaining 40% ownership would be held by Mr. Glaser, a U.S. citizen. The officers and directors of TTH are Paul Brandenburg, President and Director, Michael L. Glaser, Secretary/Treasurer and Director, Keith Burge, Director, and William W. Becker, Director.

6. Pacific & Eastern argues that the public interest is served by the grant. It argues that the ownership structure strictly complies with the conditions of *Teleport Transmission Holdings, Inc.*: 1) the ultimate parent corporation is incorporated in the United States, 2) TTH will have 100% U.S. officers and 75% U.S. directors, and 3) alien ownership is limited to 60%, while the balance of ownership, 40%, is of U.S. citizens.

7. Applicant argues that the 60% alien ownership is consistent with Commission other precedent as well, *e.g.*, *GRC Cablevision, Inc.*, 47 FCC 2d 467 (1974). Moreover, Pacific & Eastern argues that the statutory limitation on alien directorship in Sections 310(b)(3) and 310(b)(4) is met because Pacific & Eastern and TTH are both U.S. corporations with 100% U.S. officers, while TTH will have 75% U.S. directors.

8. Pacific & Eastern argues that the Commission has found that alien ownership or control of common carrier facilities is of less concern than that of broadcast facilities, because the licensee must provide nondiscriminatory service and because it has no control over the content of the transmission. *GRC Cablevision, Inc., supra; Teleport Transmission Holdings, Inc., supra.* It also argues that Congress' purposes for enacting the prohibition are not relevant here: no broadcast service exists, and any militarily sensitive communications in wartime would probably be transmitted in a digitally encoded format, so that access to the transmissions by the alien licensee would be unlikely. Moreover, it points out, the federal government has clear authority to take control of the radio stations operated by Pacific & Eastern if national security required. Finally, Pacific & Eastern points out that Canada has had long and friendly relations with the United States, and the Commission has approved many Canadian officers of licensee corporations.

[1] The officers and directors are: Paul Brandenburg, President and Director; Michael L. Glaser, Secretary/Treasurer and Director, and Keith Burge, Director.

[2] The three conditions are 1) that the ultimate parent corporation reincorporate in the U.S., 2) that the ultimate parent have 75% U.S. officers and directors upon consummation of the transaction, and 3) that its stock ownership be monitored to insure that U.S. stock ownership remains at or above 40%.

DISCUSSION

9. Pacific & Eastern is indirectly owned and controlled by Mr. William W. Becker, a Canadian citizen. Section 310(b)(4) of the Communications Act, 47 U.S.C. Sec. 310(b)(4), states in pertinent part:

> (b) No... common carrier... radio station license shall be granted to or held by --
>
> * * *
>
> (4) any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives... or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license.

10. Accordingly, we must determine whether it is in the public interest to grant the subject applications, pursuant to 47 U.S.C. Sec. 310(b)(4).[3] The Commission, by delegated authority, approved the request for transfer in the *TTH Order* on a finding that 1) the degree of indirect alien ownership was consistent with previous exercises of Commission discretion, citing *GRC Cablevision, Inc., supra*, and *GCI Liquidating Trust*, 7 FCC Rcd 7641 (1992); 2) the 25% alien officer participation in the ultimate parent, two corporate levels above the proposed transferee, was sufficiently remote as to not adversely affect the public interest; and 3) that the licensee would exercise no discretion over the content of transmissions. These findings were made specifically subject to conditions which have not been fulfilled.

11. The differences in the new ownership structure from that approved in the *TTH Order* makes the ultimate "parent" two individuals, and the majority interest holder an individual citizen of a foreign country, rather than using a publicly held corporation. In addition, the ultimate parent corporation is only one corporate level over the assignee rather than being separated by two other companies. The similarities in the new ownership structure to the earlier approved structure are the one-fourth alien directorship in the parent, the lack of any alien officers in the immediate parent, the maximum 60% alien ownership in the ultimate parental arrangement, and the lack of any foreign corporation in the chain of ownership.

12. The Commission generally has permitted alien ownership and/or participation beyond the statutory benchmarks when it has been able to identify a balanced U.S. participation in other aspects of ownership or control. *TTH Order* at 3064. The structure proposed by Pacific & Eastern is similar to that approved in *GRC Cablevision, Inc., supra*. There, the board of directors was comprised of 75% U.S. citizens, and all officers were U.S. citizens, while the ownership of the parent corporation was 60% non-U.S. Pacific & Eastern represents the same situation. Although the ownership structure is different in key respects than that approved in the *TTH Order*, it nevertheless is within Commission precedent. We find a balanced U.S. participation such that the majority alien ownership can be approved.

13. In addition, as Pacific & Eastern has argued, the content of transmissions will not be affected by the licensee. As a common carrier, it has the duty to provide service on a non-discriminatory basis, subject to its tariff. Accordingly, the importance of limiting alien participation is less than it would be for broadcast stations. Finally, as the statute indicates, the Commission may revoke a license if it finds that the public interest is no longer served by the licensee's indirect alien ownership. 47 U.S.C. Sec. 310(b)(4). Accordingly, in Pacific & Eastern's proposal, we find sufficient protection of Congressional intent to give our consent to the proposed assignment of licenses.

14. WHEREFORE, for the foregoing reasons, the applications to assign licenses to Pacific & Eastern from UPSOUTH Corporation, File No. 13084-CF-AL-94, from Bay Area Teleport, Inc., File No. 13085-CF-AL-94, and from Mtel Digital Services, File No. 13082-CF-AL-94, ARE HEREBY GRANTED, subject to the condition that the ownership and control of Pacific & Eastern and its parent corporation, Teleport Transmission Holdings, Inc., remain at or below the level of alien ownership and control discussed herein.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan,
Chief, Domestic Radio Branch
Common Carrier Bureau

[3] Pacific & Eastern suggests that Section 310(b)(4) requires a specific negative public interest finding before the Commission may deny an application for indirect alien ownership of common carrier licenses. We reject this interpretation. The statute clearly forbids direct alien ownership, but gives discretion to the Commission to make a finding that the public interest would be served by grant of a license to a licensee indirectly owned or controlled by alien interests.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

Beacon Broadcasting Corporation — File Nos. BR-910125UZ, BRH-910125VG

For Renewal of Licenses of
Station WBNR(AM)
Beacon, New York
and
Station WSPK(FM)
Poughkeepsie, New York

Culver Communications Corp., Inc. — File No. BR-910125UX

For Renewal of License of
Station WLVL(AM)
Lockport, New York

Great Lakes Wireless Talking Machine Company — File No. BRH-910201UI

For Renewal of License of
Station WZSH(FM)
South Bristol, New York[1]

Eagle Broadcasting Company — File Nos. BR-910322YT, BRH-910322YS

For Renewal of Licenses of
Stations WHCU(AM)/WYXL(FM)
Ithaca, New York

Historic Hudson Valley Radio, Inc. — File Nos. BR-910130VI, BRH-910130VE

For Renewal of Licenses of
Stations WGHQ(AM)/WBPM(FM)
Kingston, New York

MEMORANDUM OPINION AND ORDER AND NOTICE OF APPARENT LIABILITY

Adopted: April 11, 1994; Released: April 28, 1994

By the Commission:

I. INTRODUCTION

1. The Commission has before it for consideration: (i) license renewal applications for the eight captioned radio stations in New York; (ii) a Petition to Deny timely filed by the New York State Conference of Branches of the National Association for the Advancement of Colored People (NAACP) and various local NAACP branches in New York against the above-captioned renewal applications;[2] (iii) oppositions from the licensees; and (iv) the licensees' responses to staff letters of inquiry. The NAACP alleges that the above stations violated the Commission's equal employment opportunity (EEO) Rule and policies toward minorities. The petitioner requests that the Commission designate the licensees' renewal applications for hearing and deny the applications.

II. BACKGROUND

2. In challenging an application pursuant to Section 309(d) of the Communications Act, a petitioner must demonstrate party in interest status. In addition, a petitioner must, as a threshold matter, submit "specific allegations of fact sufficient to show... that a grant of the application would be prima facie inconsistent with [the public interest, convenience, and necessity]." 47 U.S.C. Section 309(d)(1); *Astroline Com. Co. Ltd. Partnership v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988) (*Astroline*); *Application of Dubuque T.V. Limited Partnership and Sage Broadcasting Corporation of Dubuque, Iowa for Assignment of Television License for KDUB-TV, Dubuque, Iowa*, 4 FCC Rcd 1999 (1989). The allegations, except for those of which official notice may be taken, must be supported by the affidavit of a person with personal knowledge of the facts alleged. 47 U.S.C. Section 309(d)(1).

3. Filed with the petition to deny were declarations under penalty of perjury from presidents of NAACP branches in the areas of each petitioned station. Each president claimed to be a regular listener to the station(s) in his or her area. We find that the declarations meet the requirements for establishing standing for the NAACP. *See American Legal Foundation v. FCC*, 808 F.2d 84 (D.C. Cir. 1987) (*American Legal*). Therefore, the challenge filed by the NAACP constitutes a valid petition to deny against the captioned stations.

III. PLEADINGS

4. The NAACP derived its factual allegations from the licensees' EEO programs and annual employment reports. Review of the allegations led us to conclude that they presented a prima facie case demonstrating that unconditional grant of the renewal applications would have been

[1] WZSH(FM) changed its call sign to WRQI(FM) on December 26, 1991.

[2] The NAACP challenged the renewal applications of 16 radio stations in New York. The current *Order* addresses the applications of eight stations. We will address the applications of the remaining stations separately.

inconsistent with the public interest. Section 309(d)(1) of the Communications Act, 47 U.S.C. Section 309(d)(1).[3] *Astroline, supra.* Further inquiry was, therefore, necessary. *See Beaumont Branch of the NAACP and the National Black Media Coalition v. FCC*, 854 F.2d 501, 506 (D.C. Cir. 1988) (*Beaumont*); *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621 (D.C. Cir. 1978) (*Bilingual*). However, review of the entire record, including the licensees' responses to further inquiries, indicates that there are no substantial and material questions of fact warranting designation for hearing. In addition, we find no evidence that any of the licensees engaged in discrimination. Thus, grant of each renewal application will serve the public interest. 47 U.S.C. Section 309(d)(2). *Astroline, supra.* Accordingly, the challenge against the licensees' renewal applications filed by the NAACP is denied and the renewal applications will be granted but with remedies and sanctions as noted, *infra.*

IV. DISCUSSION

5. Section 73.2080 of the Commission's Rules requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. When evaluating EEO performance, the Commission focuses on the licensee's efforts to recruit, employ and promote qualified women and minorities and the licensee's ongoing assessment of its EEO efforts. Such an assessment enables the licensee to take corrective action if qualified women and minorities are not present in the applicant pool. The Commission also focuses on any evidence of discrimination by the licensee. See Sections 73.2080 (b) and (c) of the Commission's Rules, 47 C.F.R. Sections 73.2080 (b) and (c).

6. When a renewal application indicates an absence of discrimination and a record of adequate EEO efforts, the application is granted, if otherwise appropriate. When it fails to evidence a record of adequate EEO efforts, the Commission may impose a variety of sanctions or remedies, such as reporting conditions, renewal for less than a full term, forfeiture, or a combination thereof. Further, the Commission will designate the application for hearing if the facts so warrant. *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987) (hereinafter *Broadcast EEO*), *petition for reconsideration pending; see also* 4 FCC Rcd 1715 (1989) (request for clarification by National Association of Broadcasters) (hereinafter *Clarification of Broadcast EEO*). *See e.g., Beaumont, supra; Bilingual, supra.*

WBNR(AM), Beacon, New York and WSPK(FM), Poughkeepsie, New York

7. A review of the licensee's 1991 EEO Program Report, opposition to the petition to deny and response to our inquiry reveals that the licensee had 29 overall, including 24 upper-level, full-time hiring opportunities from January 28, 1988, through November 27, 1990.[4] The licensee recruited for 24 of its vacancies and used general recruitment sources for various numbers of openings. Used for 11 to 18 openings were the National Association of Broadcasters (NAB), six colleges, and the *Poughkeepsie Journal.* Used for one to nine openings were the *Middletown Times Herald Record*, on-air ads, New York Department of Labor, *The Evening News, Broadcasting, Radio & Records*, Dutchess County Human Rights Commission, Radio and Television News Directors Association, American Women in Radio and TV, National Association of Media Women, Inc., four colleges, and an employment agency. The licensee reported 36 minority referrals from general sources as follows: *Poughkeepsie Journal* (18), *Radio & Records* (12), NAB (one), *Middletown Times Herald Record* (one), and walk-ins (two). The two other referrals were minority interns at the stations who applied for openings. The licensee used the following minority recruitment sources for 12 to 18 openings: two nearby NAACP branches, *Hudson Valley Black Press*, and three predominantly Black colleges. Used for one to 10 openings were: the National Council of Negro Women, *Amsterdam News, The Afro Times Daily Challenge*, nine predominantly Black colleges, the National Black Media Coalition, the Urban League, the National Association of Black Journalists, the Dutchess County Commission Against Racism, and the Martin Luther King Jr. New York State Commission. The licensee reported seven minority referrals from minority sources as follows: *Amsterdam News* (four), Howard University (one), *Hudson Valley Black Press* (one), and *Afro Times Daily Challenge* (one).

8. The licensee's records on the race of applicants is incomplete and it does not know the race of some applicants, although it has applicant flow information for all openings. The licensee stated that it is certain it received applications from at least 34 Blacks, seven Hispanics, and two Asians and that it interviewed 23 Black applicants, five Hispanics, and two Asians. One Asian was interviewed for two positions. Applications from minorities were considered for 18 positions (15 upper-level) and they were interviewed for 17 (14 upper-level). Of the 29 hires, two were minority (Black). Of 24 upper-level hires, one was minority.[5] In addition, the licensee reported that it offered a full-time upper-level disc jockey position to a Black applicant in December 1989, and offered a full-time upper-level news director position to a Black applicant in September 1990, but they declined the offers.

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[3] The licensees were not challenged regarding their recruitment of women. Nonetheless, as is our practice in all cases, we reviewed the licensees' EEO efforts in this respect and found them to be sufficient.

[4] The license terms for all of the stations in this *Order* ended on May 31, 1991.

[5] The labor force of the Poughkeepsie, New York MSA is 41.2% female and 8.9% minority (5.6% Black, 1.9% Hispanic, 1.2% Asian-Pacific Islander, and 0.2% American Indian). The licensee's Annual Employment Report for 1985 indicates that the licensee employed 27 persons overall (24 upper-level) with no minorities. In 1986, the licensee employed 30 persons overall (25 upper-level) with one (3.3%) minority (Black) in an upper-level position. In 1987, the licensee employed 28 persons overall (24 upper-level) with no minorities. In 1988, the license employed 25 persons overall (21 upper-level) with no minorities. In 1989, the licensee employed 27 persons overall (23 upper-level), with no minorities. In 1990, the licensee employed 28 persons overall (23 upper-level) with no minorities. In 1991, the licensee employed 28 persons overall (24 upper-level) with one (3.6%) minority (Black) in an upper-level position (4.2% of upper-level positions).

9. The NAACP argues that the licensee proposed using seven minority recruitment sources in its 1984 renewal application but apparently ignored the plan because it employed few minorities during the term and now proposes using only four minority sources. It argues that the licensee's EEO program is deficient but that the licensee proposes no corrective measures. Noting the licensee's claim that it received 18 minority referrals from the *Poughkeepsie Journal*, the NAACP states that this figure is so high that it is "almost inconceivable" that a general circulation newspaper could have referred so many minorities in the renewal year.

10. The licensee responded that its renewal application does not list all minority or general recruitment sources used during the term because the Commission form used for the EEO Program Report only asks for examples of sources. It stated that it actually used more than seven minority sources for recruitment, not fewer, as the NAACP had argued. The licensee also stated that it assessed its program at various times during the term and added sources in July 1988, February and September 1989, and in February, March, and August 1990. It argued that it has had difficulty attracting minority applicants because of the low number of minorities in the labor force and, citing figures from the New York Department of Labor, because of a low (3.0%) unemployment rate in its MSA. Finally, the licensee argued that the NAACP stated no basis for questioning the figure of 18 referrals (full-time and part-time) from the *Poughkeepsie Journal*. Because it had no basis, the licensee stated that the NAACP's questions should not be credited.

11. After reviewing the record of Stations WBNR(AM)/WSPK(FM), we find no substantial and material questions of fact sufficient to warrant a hearing. *See Astroline, supra*. In addition, we find no evidence indicating that the licensee engaged in discrimination. The licensee engaged in recruitment and hired and employed minorities and women. While 38% (11 of 29) of the licensee's applicant pools and 41% (12 of 29) of interview pools contained no minorities, we believe that its overall efforts were such that no forfeiture sanction is warranted. In this regard, the licensee maintained applicant flow records for all vacancies, recruited for 24 of 29 vacancies, contacted minority sources for 18 of its 29 vacancies (62%), and hired two Blacks, the only significantly represented minority group in the labor force, -- one for an upper-level position. It also offered upper-level positions to two other Blacks. Thus, the licensee hired or attempted to hire Blacks, who constitute 5.6% of the labor force, for 13.8% of overall and 12.5% of 24 upper-level vacancies. Further, we note that in two years of the license term, Blacks were employed in upper-level positions in excess of 50% of parity. Finally, it is clear that the licensee engaged in some self-assessment, adding sources six times over three years. Accordingly, renewal of the licenses is appropriate.

12. However, the licensee failed to use minority sources for 38% of vacancies, did not have minorities in 11 of its applicant and 12 of its interview pools, and failed to employ any minorities in five years of its license term. Accordingly, we impose reporting conditions to ensure that the licensee engages in sufficient self-assessment in the future.

WLVL(AM), Lockport, New York

13. A review of the licensee's 1991 EEO Program Report, opposition to the petition to deny and response to our inquiry reveals that the licensee had seven full-time hiring opportunities from December 27, 1988, through September 25, 1990, all for upper-level sales positions. The licensee recruited for six of its vacancies, using general recruitment sources. Used for six openings were the *Union Sun & Journal, Buffalo News*, Niagara County Community College, and the Niagara Community Action Program. Used for five openings was the State University College at Buffalo. Used for three openings were the Eastern Niagara County Chamber of Commerce, Lock City Business and Professional Women's Club, Niagara County Head Start, Inc., Zonta Club of Lockport, New York State Employment Service, Medaille College, State University of New York, and Niagara University. The licensee reported no minority referrals from these sources but reported one minority referral from another station. The licensee used no minority recruitment sources. The licensee reported no minority interviewees and hired no minorities among its seven hires.[6]

14. The NAACP argues that the licensee is located in the Buffalo, New York, MSA but improperly uses county labor force information for evaluating its EEO program because the county data shows fewer minorities. The NAACP criticizes the licensee for using no minority recruitment sources and for failing to propose remedial measures to improve its minority recruitment despite the fact that the licensee employed no minorities during the term. It argues that the licensee's hiring practices are inadequate to produce minorities in applicant pools.

15. The licensee responded that the NAACP is mistaken in its labor force argument. It stated that it is not included in the Buffalo MSA but is located in Niagara County, which is the same as the Niagara MSA. Despite this, the licensee claimed that it has tried to recruit minorities from the Buffalo MSA by using general recruitment sources in the Buffalo area, as indicated above. The licensee noted that minorities in the Niagara MSA total only 5.9% of the labor force and the dominant minority, Blacks, constitutes only 4.0%. The licensee further noted that the Commission does not require licensees to file an EEO program if minorities constitute less than 5% of the available labor force. *See Broadcast EEO, supra* at 3973. The licensee, even though it had just stated that minorities totalled 5.9% of the labor force, then erroneously argued that minorities total less than 5% of the Niagara MSA labor force and there is thus no issue in the instant case regarding whether it complied with the Commission's rule. Regarding minority recruitment sources, the licensee claimed that there are no minority organizations in the Niagara MSA other than the NAACP and that the NAACP was added to its source contacts at the end of the term.

[6] The labor force of the Niagara Falls, New York MSA is 41.2% female and 5.9% minority (4.0% Black, 0.7% Hispanic, 0.3% Asian-Pacific Islander, and 0.9% American Indian). The licensee employed no minorities during the term. It employed from nine to 14 employees overall from 1985-91 including nine to 13 in upper-level positions. In the renewal year, it employed nine employees, all upper-level.

16. After reviewing the record of Station WLVL(AM), we find no substantial and material questions of fact sufficient to warrant a hearing. *See Astroline, supra.* The licensee engaged in recruitment for six of its seven hires. We find no evidence indicating that the licensee engaged in discrimination. However, the licensee offered conflicting and partially incorrect arguments regarding whether it needed to include minorities in its EEO program. The licensee correctly identified itself as included in the Niagara MSA which has a labor force that is 5.9% minority (4.0% Black), thus, it must have an EEO program for minorities as well as for women. Regardless, we note that the licensee claims it recruited minorities. We also find to be without merit the licensee's argument that it is able to use only one minority source because there is only one such source in its MSA. This is unpersuasive because the licensee used general sources in the Buffalo MSA, which borders the Niagara MSA, and the licensee could presumably contact minority sources in the Buffalo area. Moreover, its general sources were totally unproductive in obtaining minority referrals, which should have prompted the licensee to add sources that were productive in obtaining minority referrals.

17. Furthermore, the licensee's recruitment efforts were deficient because it failed to recruit so as to attract an adequate pool of minority applicants for at least 66% (five) of its seven full-time positions. Only one (14%) of the seven applicant pools and none of the interview pools contained minorities. Notwithstanding the absence of minorities from the applicant and interview pools as noted above, it does not appear that the licensee consistently engaged in efforts to attract minorities or otherwise conducted meaningful self-assessment of its program, until the end of the term. In this regard, the licensee failed to use minority sources for any vacancies. Accordingly, a base forfeiture of $12,500 is warranted. *See Policy Statement,* FCC# 94-27 (Released February 1, 1994).

18. Further, the licensee's failure to recruit so as to attract an adequate pool of minority applicants for at least 33% of the overall and upper-level full-time positions renders its EEO efforts egregiously deficient warranting an upward forfeiture adjustment of $6,250, for a total forfeiture of $18,750. *See Policy Statement, supra.*

19. However, we note that minorities comprise less than 6% (5.9%) of the relevant labor force. Thus, a $6,250 downward adjustment in the forfeiture is appropriate. *See Policy Statement, supra.* In light of the above, we will issue a Notice of Apparent Liability for $12,500 and renew the license subject to reporting conditions.

WZSH(FM), South Bristol, New York[7]

20. A review of the licensee's 1991 EEO Program Report, opposition to the petition to deny and response to our inquiry reveals that the licensee had 23 overall, including 21 upper-level, full-time hiring opportunities from February 15, 1988, through November 19, 1990. The licensee recruited for all of its vacancies and used the following general recruitment sources: Rochester Institute of Technology, University of Rochester, Geneseo State University, National Technical Institute for the Deaf, administrative director of the city school district, State University at Brockport, Monroe Community College, Women's Career Center, St. John Fisher College, Greater Resources for Older Workers, American Women in Radio and TV, Rochester Job Service Center, Department of Social Services, and the Governor's School and Business Alliance. The licensee used the following sources for 20 vacancies: United Neighborhood Centers, Coalition for Children's TV, Drug and Alcohol Council, Amalgamated Clothing Workers of America, Stratford School, Monroe County Health Department, Industrial Management Council, Citizens Tax League, and Medaille College. In May 1990, the licensee added the following general sources and used them for the three reported full-time hires from June to November 1990: Nazareth College, two vocational schools, Career Development Service, Rochester Women's Network, Women's Coalition, Educational Opportunity Center, and the New York Department of Labor. Its records on minority referrals are incomplete but it reported 21 minority referrals from general sources as follows: two campuses of the State University of New York (eight), University of Rochester (three), Job Service (two), New York Department of Labor (two), various unspecified business contacts (two), walk-ins (two), and unknown sources (two).

21. The licensee contacted minority recruitment sources for all openings as follows: Spanish Action Coalition, Puerto Rican Arts and Cultural Center, Metro Act of Rochester, Baden Street Settlement, Inc., Rochester Black Media Coalition, Ibero-American Action League, Action for a Better Community, and the Urban League. The licensee added the following minority sources and contacted them for the three full-time openings after May 1990: Puerto Rican Youth Development and Resource Center, National Association of Negro Business and Professional Women's Club of Rochester and Genesee Valley, National Council of Negro Women, and the Rochester Association of Black Communicators. It reported one minority referral from one minority source – the Urban League. In addition to the recruitment sources listed above, the licensee reported that it occasionally used other stations, business associates, newspaper and magazine ads, and on-air ads for recruitment and started using on-air ads for all openings after October 1990.

22. The licensee stated that it started keeping complete records on applicants and interviewees effective with a full-time hire on March 29, 1989, but its records on the race of applicants and interviewees are incomplete prior to that date. The licensee stated, however, that it is certain that 22 minority applicants (18 Blacks, three Hispanics, and one Asian) applied for at least eight openings (seven upper-level) and that it interviewed 17 minorities.[8] Of the 23 overall and 21 upper-level hires, two were minorities – Black and Asian women hired for upper-level sales positions.[9]

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[7] The licensee acquired the station in July 1986.

[8] One Asian applicant was interviewed for two openings.

[9] The labor force of the Rochester, New York MSA is 43.1% female and 9.2% minority (6.8% Black, 1.5% Hispanic, 0.6% Asian-Pacific Islander, and 0.3% American Indian). The licensee's Annual Employment Reports for 1987 and 1988 indicate that the licensee employed 17 persons overall (16 upper-level) with no minorities. In 1989, the licensee employed 15 persons overall (14 upper-level) with no minorities. In 1990, the licensee employed 16 persons overall (15 upper-level) with one minority (6.3%) -- a Black in an upper-level position (6.7% of upper-level positions). In 1991, the license employed 12 persons overall (nine upper-level) with one minority (8.3%) -- an Asian in an upper-level position (11.1% of upper-level positions).

23. The NAACP argues that the licensee received two minority referrals from all sources during the renewal year and none from minority recruitment sources. It criticizes the licensee's EEO program because it cannot tell if minority sources were contacted for every opening. The petitioner also argues that minorities were inadequately represented in the licensee's hiring pools and that the licensee's employment of minorities was "token."

24. The licensee responded that the NAACP's criticism is unjustified because it is based on only part of its record. The licensee said it only listed examples of its recruitment sources instead of all of its sources because the EEO Program Report only requests examples. In addition to contacting a significant number of general and minority sources for all openings, as detailed above, the licensee noted that it assessed its efforts and changed its program several times. It reported that it added sources in January 1987, revised and increased record-keeping in December 1988, began making follow-up phone calls to minority sources in June 1989, expanded its source list and added minority sources in June 1990, and began advertising all openings on the air in October 1990. The licensee also claimed that more minorities were in more applicant pools than it has records for, but it cannot verify the actual count because its earliest records are incomplete.

25. After reviewing the record of Station WZSH(FM), we find no substantial and material questions of fact sufficient to warrant a hearing. *See Astroline, supra.* The licensee engaged in recruitment for all openings and hired and employed minorities and women. We find no evidence indicating that the licensee engaged in discrimination. While 65% (15 of 23) of the licensee's applicant and interview pools contained no minorities, we believe that its overall efforts were such that no forfeiture sanction is warranted. In this regard, the licensee recruited and contacted minority sources for all vacancies, and hired a Black applicant, the only significantly represented minority group in the labor force, for an upper-level position. It also hired an Asian for an upper-level position. Thus, the licensee hired minorities for 9.5% of its 21 upper-level vacancies. Further, we note that the licensee employed minorities in upper-level positions in excess of 50% of parity for the last two years of the five years it owned the station. Finally, it appears that the licensee engaged in self-assessment, adding sources, increasing record-keeping, and assessing its efforts. Accordingly, renewal of the licenses is appropriate.

26. However, the licensee's record-keeping was deficient for part of the license term, it failed to obtain minority applicants for most applicant pools, and it failed to employ minorities for the first three years of the term. Accordingly, we impose reporting conditions to ensure that the licensee has instituted adequate record-keeping and engages in sufficient self-assessment in the future.

WHCU(AM)/WYXL(FM), Ithaca, New York[10]

27. A review of the licensee's 1991 EEO Program Report, opposition to the petition to deny and response to our inquiry reveals that the licensee had 27 overall, including 20 upper-level, full-time hiring opportunities from May 1, 1988, through November 15, 1990. The licensee recruited for 15 of its vacancies and used the following general recruitment sources: *Ithaca Journal* (used for 12 vacancies), Ithaca College (six vacancies), Tompkins Cortland Community College (three vacancies), and New York Department of Labor (one opening). The licensee also claimed to have used the following sources for "several" openings but does not know the number: Syracuse University, Cornell University, and employee referrals. Two minority sources, the Greater Ithaca Activities Center and the Southside Community Center, were contacted by the licensee but it has no record of how often. Its records on minority referrals, applicants, and interviewees are incomplete. It knows it interviewed 21 persons for three positions but it failed to keep records of the interviewees' race or gender. Of the 27 overall and 20 upper-level hires, one was a minority -- an Hispanic woman hired for a full-time upper-level sales position. In addition, the licensee stated that it offered a sales position in 1987 to a Black male and a traffic manager position to an Asian woman but they both rejected the offers. The licensee also reported that it hired two Black women as receptionists in 1987.[11]

28. The NAACP argues that the licensee promised, in its 1986 assignment application, to contact two Black organizations for openings and sponsor an intern program but that it failed to do so. Also, the NAACP criticizes the licensee for reporting no minority referrals, applicants, or hires. In addition, the petitioner states that the licensee, without meaningful explanation, filed its renewal applications on March 21, 1991, which was nearly two months late, and that the late filing "seriously" prejudiced the NAACP's ability to review the applications adequately. The petitioner argues that the late filing warrants dismissal of the applications or designation for hearing.

29. The licensee responded that the NAACP was mistaken about its implementation of an EEO program after it acquired the stations. It stated that it did contact the two Black organizations mentioned in its assignment application for "several" openings in 1986 and 1987. It said that they failed to provide minority referrals so they were not contacted very often after 1987. The licensee also said it implemented an intern program and got a Nelson A. Rockefeller Minority Intern grant in 1987. It stated that it advertised "heavily" on the air for "several" months to try to attract a minority applicant for the intern program but no one applied. The licensee established an intern program with Ithaca College which provided three to four interns from 1985-90. None were minorities.

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[10] The licensee acquired the stations on May 8, 1986.

[11] The labor force of Tompkins County, New York is 45.4% female and 5.4% minority (2.2% Black, 1.3% Hispanic, 1.8% Asian-Pacific Islander, and 0.1% American Indian). The licensee's Annual Employment Report for 1987 indicates that the licensee employed 19 persons overall (17 upper-level) with two (10.5%) minorities, both Black, with one (5.9%) in an upper-level position. In 1988, the licensee employed 20 persons overall (19 upper-level) with one (5.0%) minority, a Black (5.3% of upper-level) in an upper-level position. In 1989, the licensee employed 22 persons overall (21 upper-level) with no minorities. In 1990, the licensee employed 19 persons overall (17 upper-level) with no minorities. In 1991, the licensee employed 19 persons overall (17 upper-level) with one minority (5.3%) -- an Hispanic in an upper-level position (5.9% of upper-level positions).

30. It is undisputed that the licensee's recruitment records are incomplete and do not reflect the race of all applicants or interviewees. The licensee has stated that its "ongoing assessment of its EEO efforts has been inadequate because of deficient record-keeping and because it failed to contact recruitment sources for every job opening." It further stated that it has contacted three colleges since 1986 and placed ads in the *Ithaca Journal* and *Radio & Records* but received few minority referrals and did not document these recruitment contacts. The licensee supplied letters from two of the colleges verifying that they were contacted for openings but that they did not know the number of openings.

31. The licensee also stated that the NAACP was mistaken in its statement that the licensee hired no minorities. The licensee acknowledged that the reason for the mistake was the licensee's own mistake in listing as White an Hispanic woman hired for a full-time upper-level sales position during the renewal year.[12] In addition, the licensee stated that it had difficulty attracting or keeping minority employees because their presence in the available labor force is low, the unemployment rate in the county is low, it has difficulty competing with two major colleges in the area which offer better employee pay and benefits, and that financial problems have hampered record-keeping. As examples, the licensee noted that it offered positions to two women, one of whom was Asian, who rejected the offers to accept other jobs which provided better benefits. Finally, the licensee noted that, in response to our inquiry letter, it implemented changes in its EEO program in the last days of the term. The changes included adding sources, including four minority sources and improving its record-keeping. The licensee did not explain the late filing of its renewal applications.

32. After reviewing the record of Stations WHCU(AM)/WYXL(FM), we find no substantial and material questions of fact sufficient to warrant a hearing. *See Astroline, supra.* The licensee engaged in recruitment and hired and employed minorities and women. We find no evidence indicating that the licensee engaged in discrimination.

33. However, the licensee's recruitment efforts were deficient because it failed to recruit so as to attract an adequate pool of minority applicants for at least 66% (18) of its 27 full-time positions. The licensee could not report how many of its applicant or interview pools contained minorities or how many minority referrals it received. Notwithstanding the absence of minorities from the applicant and interview pools as noted above, it does not appear that the licensee consistently engaged in efforts to attract minorities or otherwise conducted meaningful self-assessment of its program until the last days of the license term. In this regard, the licensee failed to recruit for 12 of 27 vacancies. In addition, it does not know for how many vacancies it may have used minority sources. Accordingly, a base forfeiture of $12,500 is warranted. *See Policy Statement, supra.*

34. Furthermore, the licensee's failure to recruit so as to attract an adequate pool of minority applicants for at least 33% of the overall and upper-level full-time positions renders its EEO efforts egregiously deficient warranting an upward forfeiture adjustment of $6,250. Similarly, the combination of the above and and its large number of hiring opportunities (27) warrants a further $6,250 upward adjustment, for a total forfeiture of $25,000. The number and types of deficiencies described here also warrant a short-term renewal, absent any of the mitigating factors set forth in the *Policy Statement.*

35. However, we note that the licensee hired or offered to hire minorities in numbers greater than 100% of minority representation in the relevant labor force. Thus, a $6,250 downward adjustment in the forfeiture and removal of the short term renewal are appropriate. In addition, we note that the licensee employed minorities in numbers greater than 50% of minority representation in the relevant labor force for three years of its five-year period of ownership. Thus, a further $6,250 downward adjustment in the forfeiture is appropriate. Finally, we also note that the stations are located in an area in which minorities comprise less than 6% (5.4%) of the relevant labor force. Thus, another $6,250 downward adjustment in the forfeiture is appropriate. In light of the above, we will issue a Notice of Apparent Liability for $6,250 and renew the licenses subject to reporting conditions.

36. In addition, we find that no hearing is warranted regarding the licensee's late filing of its renewal application. Although the petitioner's review of the licensee's records may have been delayed, it still had ample time to review the licensee's Annual Employment Reports and had 40 days to review the rest of the information in the applications. Nevertheless, the licensee is admonished to comply with Commission regulations regarding filing of all documents.

WGHQ(AM)/WBPM(FM), Kingston, New York

37. A review of the licensee's 1991 EEO Program Report, opposition to the petition to deny and responses to our inquiries reveals that the licensee had 35 overall, including 29 upper-level, full-time hiring opportunities from January 29, 1987, through October 15, 1990. The licensee recruited for 29 of its vacancies and used general recruitment sources for various numbers of openings. Used for nine to 17 openings were ads on the air, *Broadcasting, Radio & Records,* and the Radio and Television News Directors Association. Used for one to five openings were two local newspapers, employee referrals, six colleges, Job Network, New York State Job Service, American Job Market, the Society of Broadcast Engineers, YWCA, Zonta, Kingston Human Relations Commission, Junior League of Kingston, two branches of the League of Women Voters, Ulster County Community Action, and the Ulster County Business and Professional Women's Association. The licensee's records on minority referrals are incomplete but it reported minority referrals from these sources as follows: *Broadcasting* (three), New York State Job Service (two), and on-air ads (one). The only minority recruitment source used by the licensee was the NAACP, which was contacted for four openings and reported no minority referrals. The licensee's records on applicants and interviewees and ap-

[12] The licensee stated that the reason it listed the Hispanic woman as White was because it was under the mistaken impression that she could not be listed as Hispanic unless her last name was Hispanic. She supplied a statement verifying that she is of Mexican heritage.

plicant/interview pools are incomplete. Its records reveal that minorities were present in at least four applicant/interview pools (one upper-level). Two minorities were hired among the 35 hires, both Black women hired for clerical positions.[13]

38. The NAACP argues that the licensee used one minority source and obtained only three minority referrals in the renewal year. It also argues that the licensee appears not to have recruited publicly for all openings and to have failed to propose any remedy for "its consistently poor EEO performance." It criticized the licensee's employment of minorities during the term as being merely "token."

39. The licensee responded that it has recruited minorities for openings and has hired minorities within Commission guidelines. It stated that it has had difficulty attracting minority applicants because there are few minority recruitment sources in its area and few minorities live in its labor force. It also stated that it has sent "many" notices of job openings to the local NAACP branch "over the years" but never got a referral until the last month of the term. It then received a referral of a Black applicant for a part-time upper-level announcer position, for which he was hired. The licensee argued that its employment of minorities was not discriminatory and it did not regard any of its minority employees as tokens.

40. After reviewing the record of Stations WGHQ(AM)/WBPM(FM), we find no substantial and material questions of fact sufficient to warrant a hearing. *See Astroline, supra.* The licensee engaged in recruitment and hired and employed minorities and women. We find no evidence indicating that the licensee engaged in discrimination.

41. However, the licensee's efforts to recruit minorities were deficient because it failed to recruit so as to attract an adequate pool of minority applicants for at least 66% (23) of its 35 full-time positions. Only four (11%) of the 35 overall applicant and interview pools contained minorities. Only one (3%) of the 29 upper-level applicant and interview pools contained minorities. Thus, minorities were absent from 89% of the overall pools and 97% of the upper-level pools. Notwithstanding the absence of minorities from the applicant and interview pools as noted above, it does not appear that the licensee consistently engaged in efforts to attract minorities or otherwise conducted meaningful self-assessment of its program. In this regard, the licensee failed to recruit for six of 35 vacancies. In addition, it failed to use minority recruitment sources for 31 vacancies. Accordingly, a base forfeiture of $12,500 is warranted. *See Policy Statement, supra.*

42. Furthermore, the licensee's failure to recruit so as to attract an adequate pool of minority applicants for at least 33% of the overall and upper-level full-time positions renders its EEO efforts egregiously deficient warranting an upward forfeiture adjustment of $6,250. Similarly, the combination of the above and and its large number of hiring opportunities (35) warrants a further $6,250 upward adjustment, for a total forfeiture of $25,000. Given the number and types of deficiencies noted, a short term renewal is also warranted. *See Policy Statement, supra.* In light of the above, we will issue a Notice of Apparent Liability for $25,000, renew the licenses for a short term, and impose reporting conditions.

V. CONCLUSION

43. After considering the information before us, we find that hearings are not warranted and the records of the licensees of WBNR(AM)/WSPK(FM), WZSH(FM), WHCU(AM)/WYXL(FM), WLVL(AM), and WGHQ(AM)/WBPM(FM) support grant of their renewal applications. The licenses of WBNR(AM)/WSPK(FM) and WZSH(FM) will be renewed subject to reporting conditions to ensure they maintain adequate EEO programs. The licenses of WHCU(AM)/WYXL(FM) will be renewed subject to a Notice of Apparent Liability for $6,250 and reporting conditions; the license of WLVL(AM) will be renewed subject to a Notice of Apparent Liability for $12,500 and reporting conditions; and the licenses of WGHQ(AM)/WBPM(FM) will be renewed subject to a Notice of Apparent Liability for $25,000, reporting conditions, and a short term because of their deficient EEO recruitment efforts.

VI. ORDERING CLAUSES

44. Accordingly, IT IS ORDERED that the petition to deny filed by the NAACP against the licensees of WBNR(AM)/WSPK(FM), WZSH(FM), WHCU(AM)/WYXL(FM), WLVL(AM), and WGHQ(AM)/WBPM(FM) IS DENIED.

45. IT IS FURTHER ORDERED that the license renewal applications filed by Beacon Broadcasting Corporation for Stations WBNR(AM)/ WSPK(FM), Great Lakes Wireless Talking Machine Company for Station WZSH(FM),[14] Eagle Broadcasting Company for Stations WHCU(AM)/ WYXL(FM), and Culver Communications Corporation, Inc. for Station WLVL(AM) ARE GRANTED subject to the EEO reporting conditions specified herein.[15]

[13] The labor force of Ulster County, New York is 41.4% female and 6.1% minority (3.1% Black, 2.3% Hispanic, 0.5% Asian-Pacific Islander, and 0.2% American Indian). In 1985, the licensee employed 20 persons overall (16 upper-level) with no minorities. In 1986, the licensee employed 22 persons overall (19 upper-level) with no minorities. In 1987, the licensee employed 23 persons overall (20 upper-level) with one minority (4.4%), a Black lower-level employee. The only minority employees reported by the licensee during the term were Black lower-level employees. In 1988, the licensee employed 24 persons overall (22 upper-level) with one (4.2%) Black. In 1989, the licensee employed 23 persons overall (20 upper-level) with one (4.4%) Black. In 1990, the licensee employed 20 persons overall (18 upper-level) with one (5.0%) Black. In 1991, the licensee employed 15 persons overall (13 upper-level) with no minorities.

[14] This Order renews the license of WZSH(FM) at its location at 42 degrees 44' 47" NL, 77 degrees 25' 35" WL, as authorized in License No. BMLH-871109KC.

[15] In this regard, we are mindful of pending applications for assignment of licenses of WBNR(AM)/WSPK(FM) from Beacon Broadcasting Corporation to Enterprise Radio Corporation (File Nos. BAL-931230GM and BALH-931230GN). In the event that the license is transferred to a new licensee, the reporting conditions will apply to the assignee upon consummation of the sale or transfer. *See Woolfson Broadcasting Corporation,* 4 FCC Rcd 6160 (1989); *Arcadia, Florida,* 5 FCC Rcd 3748, 3750 n.8 (1990); *License Renewal Application of Duffy II Corporation For Station KESZ-FM, Phoenix, Arizona,* 6 FCC Rcd 1876, 1879 n.4 (1991).

46. IT IS FURTHER ORDERED that the license renewal applications filed by Historic Hudson Valley Radio, Inc. for Stations WGHQ(AM)/WBPM(FM) ARE GRANTED FOR A SHORT TERM ending June 1, 1996, subject to the EEO reporting conditions specified herein.

47. IT IS FURTHER ORDERED that, pursuant to Section 503 of the Communications Act of 1934, as amended, 47 U.S.C. Section 503, this document constitutes a NOTICE OF APPARENT LIABILITY FOR FORFEITURE in the amount of $6,250 for the licensee of WHCU(AM)/WYXL(FM); $12,500 for the licensee of WLVL(AM); and $25,000 for the licensee of WGHQ(AM)/WBPM(FM).

48. IT IS FURTHER ORDERED that the licensees of Stations WBNR(AM)/WSPK(FM), WZSH(FM), WHCU(AM)/WYXL(FM), and WLVL(AM) file an original and one copy of the following information on February 1, 1995, February 1, 1996, and February 1, 1997, and that the licensee of Stations WGHQ(AM)/WBPM(FM) file an original and one copy of the following information on February 1, 1995, and February 1, 1996:

(a) For each report, please make two lists divided by full-time and part-time job vacancies during the twelve months preceding the respective reporting dates, indicating the job title, date of hire, the race or national origin, sex and the referral source of each applicant for each job and the race or national origin and sex of the person hired. The list should also note which recruitment sources were contacted;[16]

(b) a list of employees as of the January 1, 1995, payroll period for the first report[17] and as of the January 1, 1996, and the January 1, 1997, payroll periods for the second and third reports, by job title, indicating part-time or full-time status (ranked from the highest paid classification), date of hire, sex and race or national origin;

(c) details concerning the station's efforts to recruit minorities for each position filled during the period specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment. In addition, the licensee may submit any relevant information with regard to the station's EEO performance and efforts thereunder.

49. IT IS FURTHER ORDERED, that the Mass Media Bureau send by Certified Mail – Return Receipt Requested – one copy of this Memorandum Opinion and Order and Notice of Apparent Liability to all parties.

50. The reports are to be filed with the Secretary of the Commission for the attention of the Mass Media Bureau's EEO Branch. Should the parties have any questions regarding this action, they may telephone the Mass Media Bureau's EEO Branch at 202-632-7069. Regarding the forfeiture proceedings, the licensees of WHCU(AM)/WYXL(FM), WLVL(AM), and WGHQ(AM)/WBPM(FM) may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this Memorandum Opinion and Order and Notice of Apparent Liability. Any comments relating to their ability to pay should include those financial letters set forth in the noted attachment.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[16] Such a list might start: (1) News Director: Officials and Managers; Full-time.

3 Applicants:	1 White female	A.W.R.T.
	1 Black male	Urban League
	1 Black female	NAACP

Sources Contacted: Local Newspaper, A.W.R.T., Urban League and NAACP.

Selected: Black male (12/19/94).

[17] The licensee of WGHQ(AM)/WBPM(FM) should provide a list of employees as of the January 1, 1995, payroll period for its first report due February 1, 1995, and as of January 1, 1996, for the second report due February 1, 1996. It is not required to file a third report.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 93-162

In the Matter of

Local Exchange Carriers' Rates,
Terms, and Conditions for
Expanded Interconnection for
Special Access

Pacific Bell
Revisions to Transmittal No. 1695
Tariff F.C.C. No. 128

MEMORANDUM OPINION AND ORDER

Adopted: April 26, 1994; Released: April 29, 1994

By the Chief, Tariff Division, Common Carrier Bureau:

1. On March 18, 1994, Pacific Bell filed Transmittal No. 1695 to revise its Tariff F.C.C. No. Op128. Pacific Bell proposes adding six additional telephone company central offices to the list of central offices where it will offer expanded interconnection service. Pacific Bell states that the purpose of this filing is to respond to *bona fide* requests from customers for expanded interconnection service in the ESCNCA01, LAMSCA01, PCBHCA01, SNCRCA11, SNDGCA14, and VISTACA12 central offices, located at Escondido, La Mesa, Pacific Beach, San Carlos, San Diego, and Vista, California, respectively. Description and Justification at Page 1-1. No petitions were filed against this tariff. Transmittal 1695 is scheduled to take effect on May 2, 1994.

2. This transmittal raises the same issues regarding cost allocations, rate levels, rate structures, and terms and conditions of service as those identified in the *Expanded Interconnection Tariff Order*.[1] Therefore, Transmittal No. 1695 is suspended for one day, until May 3, 1994, and will be subject to the investigation initiated in the *Expanded Interconnection Tariff Order*. These rates will also be subject to an accounting order to facilitate any refunds that may later prove necessary.

3. Accordingly, IT IS ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the revisions to Pacific Bell Tariff F.C.C. No. 128, Transmittal No. 1695, ARE SUSPENDED for one day and an investigation of the referenced tariff transmittal IS INSTITUTED.

4. IT IS FURTHER ORDERED that Pacific Bell SHALL FILE tariff revisions within five business days of the effective date of this Order to reflect this suspension.

5. IT IS FURTHER ORDERED that, for these purposes, we waive Sections 61.56, 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, and 61.59. Pacific Bell should cite the "DA" number of the instant Order as the authority for this filing.

6. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), Pacific Bell shall keep accurate account of all amounts received by reason of the rates that are the subject of this investigation.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

[1] Ameritech Operating Companies, *et. al*, CC Docket No. 93-162, 8 FCC Rcd 4589 (Com. Car. Bur. 1993) (*Expanded Interconnection Tariff Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI CABLEVISION OF ST. LOUIS, INC.

Petition for Stay of Local Rate
Order of City of St. Louis, MO

ORDER

Adopted: April 29, 1994; Released: April 29, 1994

By the Acting Chief, Cable Services Bureau:

I. INTRODUCTION

1. In this *Order*, we grant in part a Request for Emergency Stay filed by TCI Cablevision of St. Louis, Inc. ("TCI") on April 4, 1994 objecting to an order adopted by the City of St. Louis, MO ("St. Louis" or the "City") establishing rates for regulated basic cable service and associated equipment provided by TCI ("local rate order"). The local rate order requires TCI to implement certain rate reductions and refunds by May 1, 1994. TCI seeks a stay pending the Commission's resolution of TCI's appeal on the merits of the local rate order, also filed on April 4, 1994. St. Louis filed an Opposition to the stay petition on April 11, 1994. As discussed below, and based on the entire record before us, we conclude that the City appears to have fundamentally misapplied our rules by ordering a refunds back to subscribers in excess of the maximum liability that may be assessed.[1] At the same time, we believe that this regulatory conduct of St. Louis on which TCI primarily bases its request for stay results in large part from TCI's own resistance, over a prolonged period of time, to submitting its rate schedule on a timely and properly completed FCC Form 393, as required under federal and local regulations. Therefore, we grant a temporary stay of the effective date of the local rate order until June 1, 1994, and require TCI to respond in full to all outstanding requests by the City for additional data in support of its proposed equipment rates by May 9, 1994. We note that this approach fully protects subscribers' interests in possible refunds because it ensures a final decision concerning TCI's regulated rates well before the operator's potential refund liability for unreasonable overages may expire.

2. In addition, it appears from the information before us that TCI has failed to comply with our rate regulations requiring the timely, properly completed, and properly supported submission to the local franchising authority of initial proposed rates for basic cable service and associated equipment. We will take up separately from this *Order* the question of whether and what sanctions may be appropriate in these circumstances. We recognize that this is a new process for system operators, as well as for franchising authorities and the Commission. It cannot function properly, however, if the required information is not submitted in a timely and complete fashion.

II. BACKGROUND

3. *Legal Standard for Evaluating Petitions for Stay.* The Commission evaluates petitions for stay under well-settled principles. To support a stay, petitioners must demonstrate: (1) that they are likely to prevail on the merits; (2) that they will suffer irreparable harm if a stay is not granted; (3) that other interested parties will not be harmed if the stay is granted; and (4) that the public interest favors grant of a stay.[2] As described below, resolution of this particular stay petition centers mainly on the strength of petitioner's argument concerning the first prong of this test.

4. Under the Commission's rate regulations, a cable operator's overall maximum permitted rate for the basic cable service tier is based in part on the operator's monthly equipment costs. Thus, presuming the approval of an operator's overall proposed rate for basic service, the operator's permitted rate levels for equipment and for the remaining portion of the overall maximum permitted rate should assume an inverse relationship. In the present case, TCI contends that the City's local rate order is mathematically flawed because the order adopts TCI's proposed permitted rates for basic cable service, as demonstrated on TCI's FCC Form 393, but caps TCI's monthly rates for remote control units and converter boxes at their lower actual levels, without permitting TCI an offsetting increase in its tier charge for basic cable service. TCI thus argues that St. Louis has violated the Commission's benchmark regulations by setting these equipment rates at lower than permitted levels. Moreover, TCI argues that the local rate order, given this flawed holding, thus mandates TCI to implement refunds to subscribers in excess of otherwise permitted amounts.

5. St. Louis, on the other hand, argues that TCI's conduct during the City's period for review of TCI's proposed rates contributed greatly to the City's decision to issue the local rate order on March 4, 1994, as well as the City's formulation of the rate schedule to govern TCI's rates. Specifically, St. Louis argues in the Opposition that TCI failed to submit its proposed rates on a timely, properly completed FCC Form 393 on November 15, 1993, as required under federal and local regulations. TCI submitted on November 15, 1993 an admittedly incomplete computer-generated version of Form 393, under cover of an unsigned memorandum stating that TCI would submit a final Form 393 on December 1, 1993. On that date, TCI submitted a revised version of the computer-generated form proposing significantly higher permitted rates for basic service and leased equipment than those indicated on the November 15, 1993 filing. Importantly, neither of the forms included attachments or explanations in support of TCI's asserted rates, as required in the instructions to Form 393; nor did the second submission include explanations for the difference between the first and second set of rates. Furthermore, the City argues that TCI failed repeatedly over the ensuing three months to respond to numerous

[1] *See* 47 C.F.R. § 942(a).

[2] *Wisconsin Gas Co. v. FERC*, 758 F. 2d 669, 673-74 (D.C. Cir. 1985)(per curiam); *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F. 2d 841, 842-43 (D.C. Cir 1977); *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F. 2d 921, 925 (D.C. Cir. 1958).

requests for additional information in support of TCI's asserted rates, particularly with respect to rates for leased remotes and converters. The City thus states that, in light of TCI's recalcitrance, and in an effort to bring at least some measure of rate relief to subscribers, the City adopted a local rate order which merely approved TCI's proposed rates for basic cable service, but rejected TCI's proposed equipment rates for the time being. The order indicates that the rates established therein are not intended to be TCI's final just and reasonable rates, and that the City intends to issue a final rate order after receiving all requested information from TCI. As of the City's filing of its Opposition, it appears from the record that the City is fairly close to gathering from TCI all the information the City believes is necessary for approval of final rates.

III. DISCUSSION

6. Generally, the Commission prefers to leave regulation of basic tier service to the sound discretion of certified local franchising authorities. Here, we conclude that the City's election, albeit temporary, to approve TCI's proposed rates for regulated basic cable service, while reducing the operator's permitted rates for leased remote and converters, without allowing TCI an offsetting increase in the tier charge for basic service would have the effect of requiring TCI to refund amounts back to subscribers in excess of maximum levels permitted under our rate regulations.[3] Based on the record before us, it appears that St. Louis compared TCI's proposed and corresponding actual rates for basic service, installation and equipment, and approved those rates the City felt justified while rejecting those rates for which the City sought more information. The effect was to yield an aggregate revenue per-channel charge below that required by our rate regulations.[4]

7. Regardless of the particular obstacles facing a local authority, the Commission expects local franchising authorities to adhere strictly to the mathematical principles underlying the benchmark approach of regulating rates in their determination of rates for basic cable service and associated equipment. In particular, local franchising authorities must properly and accurately calculate operator's refund liability.[5] In this case, it appears that St. Louis has failed in this regard by requiring TCI to implement refunds in excess of levels permitted by our rules. Thus, we will stay temporarily until June 1, 1994 the effective date of St. Louis' local rate order. At that time, we believe that St. Louis will have all information necessary for an issuance of a final order governing TCI's permitted rates for basic cable service.

8. At the same time, however, we recognize that portions of TCI's conduct, in particular its recalcitrance in providing the City with a timely rate schedule and delay in sufficiently responding to requests for additional information, erected obstacles to the City's effort to accurately review TCI's proposed rates. In this vein, we emphasize that the Commission similarly expects cable operators to do their best to facilitate the efficient review of proposed rates by local franchising authorities. This effort should include full cooperation with reasonable requests by local authorities for data in support of asserted costs and rates.[6] Our rate regulations are clear in placing the burden on operators to justify their regulated rates for basic cable service and associated equipment.[7] However, in order to facilitate the City's accurate approval of final rates for basic services provided by TCI, we will permit TCI the opportunity to comply finally in full with the City's outstanding requests for additional information in support of TCI's rates for leased equipment. Accordingly, we require TCI to make every effort to provide all necessary information to St. Louis by May 9, 1994.

9. We emphasize that this approach affords full protection to subscribers' interests in potential refunds from TCI for overages. Under our rate regulations, TCI's refund liability dates back to September 1, 1993 or one year, whichever is less. In staying the effective date of the St. Louis local rate order only until June 1, 1994, subscribers will be ensured that no portion of TCI's potential refund liability will be lost.

10. Accordingly, IT IS ORDERED, that the Request for Emergency Stay filed by TCI Cablevision of St. Louis, Inc. is GRANTED IN PART and DENIED IN PART. Specifically, the local rate order adopted by the City of St. Louis, MO concerning rates for basic cable service and associated equipment provided by TCI Cablevision of St. Louis is STAYED until June 1, 1994.

11. IT IS FURTHER ORDERED, that TCI Cablevision of St. Louis must submit to the City of St. Louis all requested necessary information in support of TCI's asserted rates for leased equipment by May 9, 1994.

12. IT IS FURTHER ORDERED, that this Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Alexandra M. Wilson
Acting Chief, Cable Services Bureau

[3] 47 C.F.R. § 76.942(a).

[4] We believe that where a local authority's period for reviewing an operator's basic rates is due to expire shortly but the authority believes it needs further information from the operator in order to make an accurate decision and may be encountering resistance from the operator, we believe that the appropriate tack for the authority is to seek assistance from the Commission. In such cases, the Commission will endeavor to review quickly the local authority's request, and if necessary, will compel the operator to provide the authority with the requested information in a timely manner.

[5] 47 C.F.R. § 942(a).

[6] *See e.g.*, In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, *Third Order on Reconsideration*, MM Docket 92-266, FCC 94-40 (released March 30, 1994), at paras. 82 - 92.

[7] 47 C.F.R. § 76.937.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

License Renewal Applications of
Certain Broadcast Stations
Licensed to Communities in
Maryland, Virginia, West Virginia,
and the District of Columbia

MEMORANDUM OPINION AND ORDER

Adopted: April 19, 1994; Released: May 11, 1994

By the Commission:

1. The Commission has before it for consideration an application for review of an action by the Chief, Video Services Division, *License Renewal Applications of Certain Broadcast Stations Licensed to Communities in Maryland, Virginia, West Virginia, and the District of Columbia (Renewal Order)*, 7 F.C.C. Rcd 6284 (1992), which denied the identical informal objections filed by Lindsay Television, Inc. (Lindsay) against the 1991 renewal applications of 47 television stations licensed to communities in Maryland, Virginia, West Virginia and the District of Columbia.[1] The licensees of 11 of the 47 stations filed oppositions to Lindsay's application for review.

BACKGROUND

2. Lindsay argued in the proceeding below that before the staff could grant the subject renewal applications, each of the licensees should demonstrate that its television operation caused no harmful interference to the activities of the National Radio Astronomy Observatory (NRAO) at Green Bank, West Virginia. This showing was required, according to Lindsay, because in its own comparative proceeding for a new station on Channel 64 in Charlottesville, Virginia, Lindsay was required to provide protection to the NRAO facility at Green Bank at an interference level not to exceed 1 x 10 to the -17 watts per meter squared, even though its transmitter site was outside of the "Quiet Zone."[2] *Achernar Broadcasting Company*, 5 F.C.C. Rcd 962, 963 (ALJ 1990), *rev'd*, 5 F.C.C. Rcd 6309 (Rev. Bd. 1990), *rev'd*, 6 F.C.C. Rcd 5393 (1991), *recon. denied*, 7 F.C.C. Rcd 1778 (1992), *appeal pending sub nom., Lindsay Television, Inc. v. FCC*, No. 92-1149 (D.C. Cir. filed April 16, 1992). The level of interference caused by Lindsay to the NRAO became an issue because a competing applicant, Achernar Broadcasting Company (Achernar), submitted engineering evidence indicating that the power density level of Lindsay's signal would exceed the NRAO limits by a multiplication factor of 20,000. *Achernar*, 5 F.C.C. Rcd at 963. The NRAO, in the hearing on remand from the Review Board, agreed with Achernar's calculations and concluded for the first time that the proposed Lindsay facility, as well as the proposed facility of Achernar located inside the Quiet Zone, would cause harmful interference to NRAO activities. *Id.* The Commission ultimately denied the applications of both Lindsay and Achernar, finding that they were not in the public interest, because the interference to the NRAO caused by either television facility would outweigh the benefit of a new television service. *Achernar*, 6 F.C.C. Rcd at 5396.

3. In its informal objection to the renewal applications, Lindsay asserted, referring to the NRAO power density level for Channel 64 in Charlottesville, that "this exceedingly high level of protection has got to be violated" by the 47 renewal applicants on various channels transmitting from areas bordering the Quiet Zone. Yet, the NRAO did not object to any of the renewal applicants' facilities. Nor did Lindsay submit any engineering evidence to support its allegations. Indeed, Lindsay's only support for this conclusion was testimony given during its own comparative hearing by the associate director for the NRAO, who stated that the NRAO has sustained an unspecified level of broadcast station interference from a station as far south as Florida and a station as far north as Pennsylvania. *Achernar*, 5 F.C.C. Rcd at 966-67. Moreover, Lindsay argued that the holding of *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965), mandates that before the Commission could determine that grant of the renewal applications was in the public interest, the "similarly situated" renewal applicants

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[1] The stations in Maryland are: WBAL-TV, Channel 11, Baltimore; WBFF, Channel 45, Baltimore; WBOC-TV, Channel 16, Salisbury; WHAG-TV, Channel 25, Hagerstown; WHSW, Channel 24, Baltimore; WJAL, Channel 68, Hagerstown; WJZ-TV, Channel 13, Baltimore; WMAR-TV, Channel 2, Baltimore; WMDT, Channel 47, Salisbury; and WNUV-TV, Channel 54, Baltimore.

The stations in Virginia are: WAVY-TV, Channel 10, Portsmouth; WCYB-TV, Channel 5, Bristol; WDBJ, Channel 7, Roanoke; WEFC, Channel 38, Roanoke; WGNT, Channel 27, Portsmouth; WHSV-TV, Channel 3, Harrisonburg; WJCB, Channel 49, Norfolk; WJPR, Channel 21, Lynchburg; WRLH-TV, Channel 35, Richmond; WSET-TV, Channel 13, Lynchburg; WSLS-TV, Channel 10, Roanoke; WTKK, Channel 66, Manassas; WTKR-TV, Channel 3, Norfolk; WTVR-TV, Channel 6, Richmond; WTVZ-TV, Channel 33, Norfolk; WVEC-TV, Channel 13, Hampton; WVFT, Channel 27, Roanoke; WVIR-TV, Channel 29, Charlottesville; WWBT, Channel 12, Richmond; and WZXK, Channel 65, Ashland.

The stations in West Virginia are: WBOY-TV, Channel 12, Clarksburg; WCHS-TV, Channel 8, Charleston; WDTV, Channel 5, Weston; WLYJ, Channel 46, Clarksburg; WOAY-TV, Channel 4, Oak Hill; WOWK-TV, Channel 13, Huntington; WSAZ-TV, Channel 3, Huntington; WTAP-TV, Channel 15, Parkersburg; WTRF-TV, Channel 7, Wheeling; WVAH-TV, Channel 11, Charleston; and WVVA, Channel 6, Bluefield.

The stations in the District of Columbia are: WDCA-TV, Channel 20; WFTY, Channel 50; WJLA-TV, Channel 7; WRC-TV, Channel 4; WTTG, Channel 5; and WUSA, Channel 9.

[2] The National Radio Quiet Zone is a fixed 13,000-square mile area of Virginia and West Virginia surrounding the NRAO at Green Bank, West Virginia. The area was established by the Commission in 1958 to protect the activities of the NRAO from harmful interference.

must demonstrate, as was required of Lindsay, that their operations did not cause harmful interference to the NRAO.

4. The staff denied Lindsay's informal objections,[3] noting that the failure to submit engineering evidence to support its allegations regarding the stations' interference to the NRAO did not meet the burden of pleading required of even an informal objector. *Renewal Order*, 7 F.C.C. Rcd at 6285. And, in the absence of an objection by the NRAO, the staff determined that the broadcast operations of the renewal applicants co-existed with the NRAO's radio astronomy activities without the detrimental effect which would have been created by Lindsay's facility. As to Lindsay's *Melody Music* contention, the staff rejected that case's applicability to the proceeding, finding that Lindsay, in its comparative proceeding for a new station on Channel 64 in Charlottesville, and the renewal applicants were not similarly situated for two primary reasons. First, the evidence submitted against Lindsay in its comparative proceeding, specific and persuasive engineering data showing Lindsay's potential interference to the NRAO, and that submitted against the renewal applicants, conclusory and conjectural statements, were deemed by the staff as "vastly dissimilar." *Id.* Second, the staff noted that the NRAO had not objected to any of the renewal applicants as it had to Lindsay's application, whose potential interference to the NRAO had been determined by conditions specific to Lindsay's frequency assignment, transmitter location, antenna height, effective radiated power, and power input to the NRAO antennas. *Id.*[4]

APPLICATION FOR REVIEW

5. Lindsay again contends, in essence, that in its own comparative proceeding the Commission created a new policy regarding the NRAO that should now be applied to the renewal applicants. That policy, Lindsay argues, established the requirement that the Commission consider possible interference to the NRAO as a factor affecting the basic technical qualifications of television applicants. Having instituted this new standard, Lindsay asserts, the Commission must apply it to all similarly situated applicants. And, according to Lindsay, the staff's decision "highlights" the similarities between its proceeding and that of the renewal applicants by noting that the NRAO had never objected to the continued operation of any existing station: nor had the NRAO objected to Lindsay's application either, until the Review Board remanded the ALJ's Initial Decision to determine whether either Achernar's facility or Lindsay's facility, or both, would interfere with NRAO activities. *Achernar*, 5 F.C.C. Rcd at 963.

6. Moreover, Lindsay maintains that the staff's dismissal of Lindsay's allegations as "general" and "conclusory" is unfounded in light of the specified level of interference which the Commission found excessive in Lindsay's own case. Also in the record, Lindsay contends, is NRAO testimony in the comparative proceeding that radio astronomy activities at Green Bank have sustained interference from one station as far south as Florida and one station as far north as Pennsylvania. *Id.* at 966-67. Consequently, Lindsay states, its allegations that a harmful level of interference was likely to be caused by the renewal applicants leaves for the Commission the task of "simple calculation to see who is right and who is wrong." According to Lindsay, the Commission has available in license files all of the information needed to compute the possible interference to the NRAO created by the 47 renewal applicants. Thus, Lindsay argues, the staff's denial of its informal objections should be reversed.

DISCUSSION

7. At the outset, we reiterate our standards with regard to the NRAO in order to rectify Lindsay's mistaken characterization of our policy that all applicants for a new station, as well as for renewal, are required to make a showing of noninterference to radio astronomy activities. Our objective for the past 35 years has been to provide radio astronomy activities with "maximum practicable protection" without unduly disrupting existing radio services. *Interference Protection to Frequencies Utilized for Radio Astronomy*, 17 R.R. 1738, 1739 (1958). Section 73.1030 reflects this concern in that it requires an applicant seeking authority to construct a new broadcast station or authority to make changes in the frequency, power, antenna height, or antenna directivity of an existing station located within the Quiet Zone to notify the NRAO in writing of its proposal simultaneously with the filing of its application with the Commission. If the NRAO objects to the proposed operation during the subsequent 20-day comment period, the Commission "will consider all aspects of the problem and take whatever action is deemed appropriate." 47

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[3] Because the staff had already granted the renewal applications of 29 of the 47 television stations prior to receipt of the informal objections, it determined that Lindsay's objections to those stations' applications were not timely filed. *Renewal Order*, 7 F.C.C. Rcd at 6284. Notwithstanding the lateness of those filings, the staff considered the objections as informal requests for reconsideration of the grant of those 29 renewal applications. *Id.* With regard to the remaining 18 renewal applications, the staff accepted the informal objections as timely filed pursuant to Section 73.3587 of the Commission's Rules, which provides that any party may file an informal objection prior to Commission action on an application. *Id.* Those 18 stations were: WDCA-TV, WEFC, WJCB, WJLA-TV, WJZ-TV, WLYJ, WMAR-TV, WNUV-TV, WRC-TV, WRLH-TV, WTKK, WTKR-TV, WTRF-TV, WTTG, WUSA, WVAH-TV, WVFT, and WZXK. Whether considered as informal objections or as informal requests for reconsideration, the staff denied Lindsay's 47 informal objections. *Id.* at 6286. Thereafter, in September 1992, the staff granted the renewal applications of 12 of the 18 remaining applications and, as of the filing of Lindsay's application for review, on October 26, 1992, six applications, those of WDCA-TV, WJLA-TV, WMAR-TV, WRC-TV, WTTG and WUSA, remained pending for reasons unrelated to this proceeding. Since that time, impediments to the renewal for WDCA-TV and WTTG have been resolved and their applications have been granted, on October 18, 1993 and December 10, 1993, respectively. The renewal application of WMAR-TV was designated for comparative hearing on March 29, 1993.

[4] The staff also noted, citing the Commission's decision in *Achernar*, 7 F.C.C. Rcd at 1778, that Lindsay's application was denied in the comparative proceeding not because of the potential interference to the NRAO, but because Lindsay failed to persuade the Commission that granting its application would serve the public interest despite the detrimental effect grant of that application would have on Quiet Zone activities. Accordingly, the staff determined that because Lindsay had failed to make a sufficient threshold showing of interference by the renewal applicants to the NRAO, it was not necessary to request of those applicants, nor to balance, any offsetting public interest factors, as required of Lindsay in its comparative proceeding.

C.F.R. §73.1030(a). This notification requirement indicates that the Commission believes that the threat of interference to the NRAO from new and modified stations within the Quiet Zone "is of such pressing concern as to warrant imposition of a special notification requirement that might be unduly burdensome if imposed beyond the Zone." *Achernar*, 6 F.C.C. Rcd at 5394. However, although an applicant for a broadcast operation located outside of the Quiet Zone is not subject to the notification requirement of Section 73.1030, it may be required to make a showing of noninterference or offsetting public interest factors only when a *prima facie* case of interference has been made based upon the objection of the NRAO or of "someone who believes that the public interest would be disserved" by a facility outside the Zone. *Id.*

8. Thus, the Commission does not seek *sua sponte* to determine whether broadcast interference to NRAO facilities will occur. Rather, we are apprised of such potential interference upon the objection by the NRAO against a broadcast facility within the Quiet Zone, pursuant to Section 73.1030(a), and upon the objection by either the NRAO or another party against a facility outside the Zone, pursuant to the rules for a petition to deny or for an informal objection. Accordingly, any such petition to deny or informal objection, *see Area Christian Television, Inc.*, 60 R.R. 2d 862, 864 (1986), must meet the threshold requirements of Section 309(d) of the Act.[5] To begin with, allegations must be specific, not those capable of supporting more than one plausible conclusion. *See Arnold L. Chase*, 5 F.C.C. Rcd 1642, 1645 (1990). Additionally, the allegations of fact, except for those we can officially notice, must be supported by an affidavit from a person with personal knowledge of those facts. And, allegations of "ultimate, conclusory facts or more general allegations based on information and belief" are inadequate. *Bilingual Bicultural Coalition v. FCC*, 595 F.2d 621, 629 (D.C. Cir. 1978) (quoting S. Rep. No. 630, 86th Cong. 1st Sess. 3 (1959)). If the petitioner successfully meets these basic pleading requirements, the Commission will determine whether the petition alleges facts that, if true, establish a *prima facie* case that a grant of the application would not serve the public interest. If so, the burden is then on the applicant to persuade the Commission that grant of its application would outweigh the concomitant detrimental effects to the NRAO. *Achernar*, 6 F.C.C. Rcd at 5395. Any substantial and material questions of fact are to be resolved in a hearing. Finally, in making our public interest determination, whether the NRAO objects to the facility at any stage of the proceeding will be considered "in light of all relevant facts and circumstances." *Id.*

9. In this case, Lindsay merely alleged in its informal objection before the staff that "a harmful level of interference was likely to be caused by the renewal applicants." In support of this conjectural and conclusory allegation, Lindsay proffered no engineering evidence. Instead, it relied upon testimony given during Lindsay's earlier comparative hearing by the associate director for the NRAO, who stated that the NRAO has sustained an unspecified level of broadcast station interference from a station as far south as Florida and a station as far north as Pennsylvania. *Achernar*, 5 F.C.C. Rcd at 966-67. As the staff noted, interference limits established by the NRAO are unique to every broadcast station, calculated by considering demonstrable receiver sensitivities and standards for antenna sidelobe responses, the proximity of the transmitter's radio frequency to a protected radio astronomy band, and existing interference conditions over which the Quiet Zone has no control, such as the radiation propagated into the Quiet Zone by the ionosphere. *Renewal Order*, 7 F.C.C. Rcd at 6285 n.4 (citing *Achernar*, 3 F.C.C. Rcd 5421, 5427 (ALJ 1988)). Consequently, testimony by the NRAO's associate director with regard to unspecified stations in Florida and Pennsylvania does not satisfy the requirements that Lindsay's allegations be "specific" and supported by an affidavit from a person with personal knowledge of the facts. Moreover, Lindsay's conclusory allegation that the 47 renewal applicants will likely cause interference to the NRAO facility, without specific supporting engineering evidence, does not establish a *prima facie* showing that grant of the applications would not be in the public interest. In the absence of such a showing, therefore, the renewal applicants are not obligated to submit engineering or other information to counter Lindsay's unsupported allegations.

10. Now, in its application for review, Lindsay attempts to shift the evidentiary burden to the Commission, which, Lindsay contends, should employ its staff and resources to collect data from each of the 47 station files at the Commission, where "most" of the necessary information is located, compute their respective power density limits utilizing the NRAO formula, and determine whether Lindsay's speculative allegations are right or wrong. As discussed above, the mechanism for ensuring protection of NRAO activities from interference created by facilities located outside the Quiet Zone is triggered by a *prima facie* showing by the NRAO or a party filing a petition to deny or informal objection. In this regard, Lindsay has not carried its burden as an objector, nor has it demonstrated in this case that the Commission's initial reliance on the pleadings of outside parties where stations outside the Quiet Zone are involved is misplaced. Lindsay's claim that it is "a single applicant who has already undertaken extraordinary obligations and costs in this matter" is no justification for abandoning its burden of pleading. This is not the type of case in which exceptions to the requirement of specific pleadings are made, because the data, as Lindsay concedes, is clearly not wholly within the knowledge of the renewal applicants. *See, e.g., United Telephone Co. of Ohio*, 27 F.C.C. 2d 417, 421 (1970). Moreover, while, as Lindsay asserts, the Commission is the agency of expertise and experience in matters regarding the radio spectrum, we are not obligated to assume Lindsay's burden as objector.

11. As to Lindsay's invocation of *Melody Music* in support of its assertion that the 47 renewal applicants are "similarly situated" to Lindsay and must, therefore, also demonstrate that their operations do not cause harmful interference to the NRAO, we concur with the staff's conclusion that no such similarities exist. Lindsay's attempt at this stage to establish a basis of similarity between its

[5] Section 309(d)(1) states, in pertinent part: "The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with [serving the public interest, convenience, and necessity]."

situation and that of the renewal applicants by noting that the NRAO did not object initially in its own proceeding nor in those of the renewal applicants is without merit. The submission by the competing applicant in Lindsay's comparative proceeding of specific and persuasive engineering evidence demonstrating that Lindsay's proposed facility on Channel 64 in Charlottesville would create interference in the Quiet Zone that would exceed the NRAO's limits by a multiplication factor of 20.000 was in itself a sufficient predicate for our request that Lindsay demonstrate offsetting public interest factors. Here, neither Lindsay nor any other party has presented persuasive engineering evidence correlative to that presented against Lindsay in its proceeding.[6]

12. For the reasons stated above, we find that Lindsay Television, Inc. has failed to set forth specific facts which, if true, would establish that a grant of the renewal applications for the 47 television stations noted above would be *prima facie* inconsistent with the public interest, convenience and necessity. *See, e.g., Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988).

13. Accordingly, IT IS ORDERED That the application for review filed by Lindsay Television, Inc. against the license renewal applications of 47 television stations located in Maryland, Virginia, West Virginia and the District of Columbia IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[6] In connection with Lindsay's *Melody Music* argument, we note that Lindsay and the renewal applicants are not similarly situated in other respects as well. Lindsay was participating in a comparative hearing for a new station while the renewal applicants seek to renew their licenses for existing stations. Section 307(c) of the Communications Act, as amended, recognizes that the Commission may evaluate existing licensees on a somewhat different basis from new applicants. *See National Citizens Committee for Broadcasting*, 436 U.S. 775, 810-11 (1978). The Commission's radio astronomy policy, set forth in Section 73.1030, also acknowledges that differential treatment may be accorded the two types of applicants by requiring notification to the NRAO by only applicants for new and modified facilities. Moreover, it appears that the NRAO has acceded to this policy, because it has never, to our knowledge, objected to interference from an existing station. *Achernar*, 6 F.C.C. Rcd at 5395, and it does not object to any of the renewal applications before us, as it did to Lindsay's application for a new station. However, in the event a *prima facie* showing of interference were submitted against a renewal applicant, we would consider the existing status of a station as a crucial factor in our public interest balance.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SPRINT COMMUNICATIONS COMPANY — File No. I-T-C-94-110

Application for authority to acquire and operate facilities for service between the U.S. and Marshall Islands

ORDER AND AUTHORIZATION

Adopted: April 29, 1994; Released: May 11, 1994

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and the Marshall Islands by Sprint Communications Company (Sprint).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-94-110 IS GRANTED and Sprint is authorized to:

a. lease from Comsat and operate one 1.5 Mbps satellite circuit between the San Ramon, California earth station and an appropriate INTELSAT satellite over the Pacific Ocean, connecting with a similar circuit between the satellite and an earth station in the Marshall Islands furnished by Sprint's correspondent in the Marshall Islands;

b. own and operate one 1.5 Mbps circuit in the San Ramon earth station to be used in conjunction with the satellite space segment capacity;

c. own and operate connecting facilities between the San Ramon earth station and Sprint's Stockton, California operating center; and

d. use facilities in a. b and c above to provide Sprint's regularly authorized services, including switched voice service, between the U.S. and the Marshall Islands.

3. IT IS FURTHER ORDERED that our authorization of MCI to provide private lines as part of its authorized services is limited to the provision of such private lines only between the United States and the Marshall Islands -- that is, private lines which originate in the United States and terminate in the Marshall Islands or which originate in the Marshall Islands and terminate in the United States. In addition, Sprint may not -- and Sprint's tariff must state that its customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or the Marshall Islands end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that the Marshall Islands affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991) *petitions for reconsideration pending.*

4. IT IS FURTHER ORDERED that neither Sprint nor any persons or companies directly or indirectly controlling or controlled by Sprint, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which Sprint or any persons or companies controlling or controlled by Sprint are parties.

5. IT IS FURTHER ORDERED that the applicant shall file a copy of any operating agreement it enters into with its foreign correspondent with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to §203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. §63.15(b).

9. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

10. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Orion Satellite Corporation — CSS-93-006-(AL)

Application for Consent to *Pro Forma* Assignment of International Space Station Authorization

MEMORANDUM OPINION AND ORDER

Adopted: April 19, 1994; Released: May 11, 1994

By the Acting Chief, Common Carrier Bureau:

1. In the above-referenced application, Orion Satellite Corporation (Orion) seeks consent to the *pro forma* assignment of a license to construct, launch and operate an international communications satellite system to International Private Satellite Partners, L.P. ("IPSP" or "Partnership"). The applications were filed before the Commission on December 2, 1992, and were placed on public notice January 11, 1993.[1] No comments were filed.

BACKGROUND

2. Orion is a U.S. corporation licensed by the FCC to construct, launch and operate an international communications satellite system. The Partnership to which the applicant proposes to assign its license consists of one general partner -- Orion -- and eight limited partners that contributed 75% of the equity.[2] The applicants have submitted, in addition to the necessary assignment of license application and Licensee Qualification Report, a copy of the IPSP Limited Partnership Agreement ("Partnership Agreement").

3. In a previous decision, the Commission granted Orion,[3] as general partner, the space station license conditioned to require Orion to maintain full control of the satellite system. Orion now wishes to amend its license to make the Partnership the licensee. The Partnership would thus hold the license, with all its responsibilities and requirements. Orion argues that the proposed assignment is in the public interest because Orion will continue to control IPSP and the satellite facilities by virtue of its status as general partner. In addition, Orion states that ownership of Orion will not change. Orion asserts that the proposed change will eliminate confusion and uncertainty about the relationship between Orion and IPSP regarding the space station license, caused by the separation of the license from the right to use the satellite capacity.

4. We note that since we granted Orion the license, Orion has amended its Limited Partnership Agreement. The new provisions, *inter alia*, require the general partner to (a) gain majority limited partner approval before (i) selling additional interests in the partnership, or (ii) designating a General Manager of IPSP services[4] from Orion's Executive Management; (b) call meetings of a Technical Committee,[5] which would advise the general partner on "matters relating to the technology and operation of the Partnership's satellite system and transmission network";[6] and (c) report to the limited partners on "significant developments" of IPSP Services, including "information concerning... the strategy for market entry, the development of service offerings, and the appointment or removal of representative agents and distributors... as well as the work program for IPSP Services as it is reflected in the budget."

DISCUSSION

5. The issue in *Orion* involved the use of a limited partnership with foreign equity participation to finance the operation of a separate satellite system licensed to Orion in its capacity as the general partner. It was therefore important for purposes of Sections 310 (a), 310 (d) and 308 (c) of the Act that the Commission take steps to ensure that Orion maintain effective control of the Partnership and the licensed system.[7] The Commission agreed with Orion that compliance with the Commission's broadcast attribution rules would ensure that the limited partners cannot, at least under the terms of Orion's Draft Limited Partnership Agreement (DLPA), exercise effective control of the Part-

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[1] *See* Report No. I-6755.

[2] The partners and their respective equity contributions include:

General Partner	
Orion Satellite Corporation (US)	$30 m
Limited Partners	
General Dynamics Commercial Launch Services (US)	$10 m
British Aerospace Communications, Inc. (UK)	$30 m
MCN (France)	$10 m
Trans-Atlantic Satellite, Inc. (Japan)	$10 m
Kingston Communications International, Ltd. (UK)	$ 5 m
Com Dev Satellite Communications, Ltd. (Canada)	$ 5 m
Orion Network Systems, Inc. (US)	$10 m
STET-Societa Finanziaria Telefonica-per Azioni (Italy)	$10 m

[3] *Orion Satellite Corporation*, 5 FCC Rcd 4937 (1990) (*Orion*).

[4] The General Manager directs the management of IPSP services, defined generally as transmission-based telecommunications services other than the mere sale or lease of units of transmission capacity on the Partnership's satellite system. *See* Third Amendment to Second Amended and Restated Agreement of Limited Partnership of International Private Satellite Partners, L.P., p. 3.

[5] The Technical Committee would consist of a representative of each partner.

[6] The general partner would not be required, however, to seek the advice of the Technical Committee on any matters pertaining to the day-to-day operations of the satellite system.

[7] The Commission stated in *Orion* that "proper insulation of the Limited Partners would ensure that the Limited Partners cannot, at least under the terms of Orion's Draft Limited Partnership Agreement, exercise effective control of the Partnership's business and policy decisions." *Orion Satellite Corporation*, 5 FCC Rcd at 4940 (1990).

nership's business and policy decisions.[8] The Commission further stated that Orion had taken action to ensure the limited partners were insulated from control of the Partnership's business and policy decisions.[9] As a result, the Commission found that the terms of the DLPA did not give the limited partners sufficient authority to constitute control of the system.

6. Upon consummation of the proposed assignment, the license will be held by the Partnership. Thus, unlike the situation in *Orion*, the Commission need not be concerned that an unlicensed investor may attempt to control the subject Title III authorization, since the limited partners will be a part of the licensed entity and subject to FCC jurisdiction. Furthermore, we find here that the new provisions are consistent with the insulation provisions that applied to the IPSP limited partners at the time of licensing. The provisions do not permit the limited partners to consult and advise the general partner or require or permit the general partner to consult with the limited partners on Partnership policy and planning matters, or on the day-to-day activities and operations of the satellite system, to a greater extent than at the time of licensing. Although the limited partners have the right to reject the general partner's designation of a General Manager of IPSP services, they do not have the right to dismiss the General Manager once they accept a designation.[10] Section 7.10 of the Partnership Agreement also appears to prohibit the limited partners from communicating with the General Manager on matters concerning the day-to-day operations of the Partnership business, in the same way they are prohibited from communicating with the general partner on such matters.[11] To ensure there is no doubt about the scope of the prohibition on limited partner communication, we condition this authorization specifically to prohibit the limited partners from communicating with the General Manager on matters pertaining to the day-to-day operations of the Partnership's satellite facilities. Accordingly we find that, upon consummation of the proposed assignment, effective control of the authorized system will remain with Orion.[12] We further find that the Partnership Agreement and its related documents do not transfer control of the system to the limited partners.[13]

7. In order to assess compliance with Sections 310(a) and 308(c) of the Communications Act, as amended, and to ensure that the Commission retains sufficient information on the identity and interest of new partners prior to the admission of those new partners, we will require IPSP to file with the Commission the same documents required of Orion in the *Orion* order.[14]

8. Upon consideration of the applications and relevant Commission policy, we find that the proposed assignment does not involve a change in ownership or control which would adversely affect the public interest. Accordingly, we consent to the proposed assignments.

ORDERING CLAUSES

9. Accordingly, IT IS ORDERED, pursuant to Sections 4 (i) and (j), 308, 309, 310 and 319 of the Communications Act, as amended, 47 U.S.C. §§ 4 (i) and (j), 308, 309, 310 and 319, that the application (File No. CSS-93-006-(AL)) of Orion Satellite Corporation for consent to the assignment of its international satellite space station license to International Private Satellite Partners, L.P. IS GRANTED.

10. IT IS FURTHER ORDERED that IPSP shall be bound by the same conditions imposed on Orion in *Orion Satellite Corporation, supra* note 3, or in *Orion Satellite Corporation*, 6 FCC Rcd 4201 (1991).

11. IT IS FURTHER ORDERED that no IPSP limited partner shall communicate with the General Manager of IPSP services, as defined in the Second Amended and

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[8] The Commission stated that Orion could hold the license for the satellite system as long as it retained, in fact, full control of the business and policy decisions of the Partnership.

[9] Orion took the following actions to comply with the broadcast attribution rules:

1. DLPA stated that general partner has "full, exclusive and complete discretion to manage and control the business."

2. DLPA had specific language limiting the ability of limited partners to control the system:

A. Limited partners cannot "take part in day-to-day management, operation or control of the business and affairs of the Partnership."

B. Limited partners have no right, power or authority to act for or to bind the Partnership or transact any business in the name of the Partnership.

C. Limited partners cannot act as employee of the Partnership, with one exception.

D. Limited partners cannot communicate with the general partner on matters pertaining to day-to-day operations of the Partnership's communication satellite facilities.

E. Limited partners cannot remove general partner without an independent finding.

3. Orion removed provisions to make its proposal more consistent with the Commission's broadcast attribution rules.

A. Orion removed provisions in the original DLPA that permitted the limited partners to consult and advise the general partner on Partnership policy and planning matters.

[10] Such right is vested exclusively in the general partner pursuant to the general partner's authority to manage and control the business of the Partnership, as set forth in Section 7.01(a) of the Partnership Agreement. *See* Letter from Thomas J. Keller, Counsel for International Private Satellite Partners, L.P., to Susan O Connell, Common Carrier Bureau, FCC, dated April 14, 1994 (*Letter*).

[11] *See* Letter, *supra* note 10.

[12] Because we find that effective control of the Partnership will reside with Orion as general partner, we are satisfied that the proposed assignment will not result in any violation of Section 310 (a) of the Act.

[13] Thus, issues under Sections 310(a) and 308(c) which were resolved by insulating the limited partners from control of the partnership and the satellite facilities, and which would arise again if the new amendments to the Partnership Agreement vested control back in the limited partners, remain resolved. *See Orion*, at n.40 ("We find that since Orion as General Partner retains full control of the Partnership, and that the license is held by Orion, a U.S. corporation, issues under Section 310(a) of the Communications Act, as amended, are resolved at this time.").

[14] *See Orion*, 5 FCC Rcd at 4939 n.30 and 4942-3.

Restated Agreement of Limited Partnership, on matters pertaining to the day-to-day operations of the Partnership's international communications satellite facilities.

12. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4 (b) (2)).

FEDERAL COMMUNICATIONS COMMISSION

A. Richard Metzger, Jr.
Acting Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

First Class Radiotelegraph Operator's Certificate T1-HQ-4271 — NAL Acct No. 215HF0016

Joseph Sawchuk, IV
Marion, North Carolina

MEMORANDUM OPINION AND ORDER

Adopted: April 12, 1994; Released: May 11, 1994

By the Commission:

I. INTRODUCTION

1. The Commission has before it an Application for Review filed by Joseph Sawchuk, IV, pursuant to Section 1.115 of the Rules, 47 C.F.R. § 1.115, seeking reversal of the finding by the Chief, Field Operations Bureau, that Mr. Sawchuk is liable for a $5,000 forfeiture. The Commission found Mr. Sawchuk liable for willful violation of Section 13.62 of the Rules, 47 C.F.R. § 13.62, by aiding and abetting the willful and repeated violation of Section 353(b) of the Communications Act, 47 U.S.C. § 353(b),[1] and Section 80.159(b) of the Rules, 47 C.F.R. § 80.159(b).

II. BACKGROUND

2. The finding of a violation is based upon Mr. Sawchuk's action of serving as sole radio officer aboard the Vessel PATRIOT without a required Six Months Service Endorsement to his First Class Radiotelegraph Operator's Certificate (T1-HQ-4271) which violated Section 353(b) of the Act and Section 80.159(b) of the Rules. In its Notice of Apparent Liability (NAL/Notice), 7 FCC Rcd 6318 (1992), the Field Operations Bureau originally issued a $10,000 forfeiture. In the NAL, the Bureau considered the fact that Mr. Sawchuk had acted as the sole radio operator on more than one occasion and could be subjected to an increased forfeiture amount for repeated violations. The Bureau, however, found it appropriate not to increase the amount because of Mr. Sawchuk's prior history of compliance with Commission Rules. Mr Sawchuk filed a response to the NAL for $10,000 on April 14, 1993. Based on this response, particularly evidence showing that Mr. Sawchuk had become eligible for the Endorsement during part of the period he sailed, the Bureau reduced the forfeiture amount and issued a Forfeiture Order finding Mr. Sawchuk liable for a $5,000 monetary forfeiture. *In the Matter of Joseph Sawchuk IV*, DA 93-437 (April 14, 1993). Mr. Sawchuk now requests Commission review of that Order.

III. DISCUSSION AND CONCLUSIONS

3. On review, Mr. Sawchuk argues that the Bureau failed to consider the facts and circumstances that led to the violation, and should have canceled or adjusted the forfeiture amount downward to a nominal amount based on Mr. Sawchuk's history of prior compliance, his good faith reliance on misinformation and voluntary disclosure of the violation, his inability to pay, and the minor nature of the violation. Mr. Sawchuk's argument, in sum, is that the Bureau failed to adequately consider and apply the proper standard and downward adjustment criteria set out in the Commission's *Policy Statement, Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993).

4. With respect to the argument that the Bureau failed to consider Mr. Sawchuk's history of prior compliance, we reject this contention. In assessing the amount of the forfeiture, the Bureau clearly considered this criterion as noted in the NAL and reduced the proposed forfeiture amount from $16,000 to $10,000. *See* Notice of Apparent Liability, 7 FCC Rcd 6318, at Para. 8 (1992).[2]

5. We also find no error in the Bureau's decision to refrain from applying the "good faith" downward adjustment criterion. The Bureau considered and rejected Mr. Sawchuk's argument that he had acted in good faith on his radio operator's union reassurance that the Endorsement requirement had been waived by the FCC. The Bureau rejected this argument based on case precedent holding that reliance upon the erroneous advice of one's agents does not excuse liability. *See Triad Broadcasting, Inc.*, 96 FCC 2d 1253 (1984).[3] Similarly, the Bureau properly rejected Mr. Sawchuk's assertion that he had voluntarily disclosed the violation to the Bureau. The Bureau found that the disclosure was inadvertent. Although we agree that the filing of the application for renewal of the First Class Radiotelegraph License and of the Endorsement were voluntary acts, the Bureau ascertained the violative activities on its own as part of its review of the records. Mr. Sawchuk did not submit the records to disclose noncompliant activity, but rather to obtain an endorsement based on illicit activity.

6. The Bureau also considered, but rejected Mr. Sawchuk's argument that he was unable to pay the forfeiture. The Bureau expressly requested documentation

[1] The radio operator requirements embodied in Section 353 are derived from requirements imposed through the Safety of Life Convention to which the U.S. is a signatory. *See generally* Pub. L. No. 121, 89th Cong., 1st Sess., 79 Stat. 511 (1965).

[2] We note that the Commission previously issued a Memorandum and Order (M & O) to Joseph Sawchuk, IV, *see* FCC 85-468 (1985) in response to his Application for Review regarding qualified service for purposes of obtaining a Six Months Service Endorsement. The M & O affirmed the Bureau's denial of Mr. Sawchuk's request for issuance of an Endorsement based on service aboard foreign-flagged vessels. Because the prior M & O and previous related correspondence specifically informed Mr. Sawchuk of the Commission's inability to waive the statutory requirement, the forfeiture amount was adjusted downward from $16,000 to $10,000, and not by the full 50%.

[3] The Bureau also considered records, including the M & O and correspondence directed to Sawchuk in 1984 and 1985, which specifically informed him that the requirement for an Endorsement was statutory and, therefore, could not be waived. *See* note 1.

from Mr. Sawchuk in support of his inability to pay. *See Notice of Apparent Liability*, 7 FCC Rcd 2d 6319, n.2. He indicated, however, that he was reluctant to provide this information because of privacy concerns. Despite the Bureau's reassurances that Section 0.457 of the Commission's Rules, 47 C.F.R. § 0.457, provided him protection, Mr. Sawchuk did not submit the requested information. Mr. Sawchuk also argues that the Bureau should have accepted his affidavit as proof of his inability to pay. We reject this argument. The Bureau did consider his affidavit, and found his simple assertion that he was unable to pay insufficient to support his contention. The Bureau found it necessary to request supporting documentation. We, therefore, find no error in the Bureau's decision not to mitigate the forfeiture amount on this basis.

7. Finally, Mr. Sawchuk also argues that the forfeiture amount should have been reduced by 90% because the Bureau did not find the action egregious, and, therefore, the violation was minor. The *Policy Statement* outlines a base amount that may be adjusted upward or downward depending upon the degree of severity of a violation, and sets forth a suggested range that may be applied. Under these guidelines, the Bureau was well within its discretion to adjust downward by 20% rather than 90% for a violation which it did not find egregious enough to warrant upward adjustment or minor enough to warrant a full reduction of 90%. The forfeiture amount falls within the suggested range.

IV. CONCLUSION

8. In his request for review, Mr. Sawchuk has not shown that the Bureau erred in its findings of fact, or misapplied the law and Commission policy to the facts. All relevant facts were considered by the Bureau in reaching its finding of liability for monetary forfeiture. We find that the Bureau applied the correct standard in determining Mr. Sawchuk's liability for forfeiture under the Commission's *Policy Statement*. The Bureau considered all facts and circumstances applicable to each of the criteria set out in the *Policy Statement*.

IV. ORDERING CLAUSES

9. We have reviewed the Bureau's action and find no error. Accordingly, IT IS ORDERED, that, pursuant to Section 1.115(g) of the Commission's Rules, 47 C.F.R. § 1.115, the request for cancellation or reduction of the forfeiture issued to Joseph Sawchuk, IV, is DENIED.

10. IT IS FURTHER ORDERED that Joseph Sawchuk, IV, shall submit the $5,000 monetary forfeiture payment within 30 days of the receipt of this order. Payment may be by check or money order payable to the Federal Communications Commission. Please place NAL number 215HF0016 on the remittance and send it to:

Federal Communications Commission

Post Office Box 73482

Chicago, Illinois 60673--7482

11. IT IS FURTHER ORDERED that the Secretary shall send a copy of this Order to Mr. Sawchuk's legal representative by Certified Mail - Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SPRINT COMMUNICATIONS COMPANY, LP — File No. I-T-C-94-062

Application for authority to acquire and operate facilities for service between the U.S. and Sudan.

ORDER AUTHORIZATION AND CERTIFICATE

Adopted: March 28, 1994; Released: May 11, 1994

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct and transiting service between the U.S. and Sudan by Sprint Communications Company, LP (Sprint).[1]

2. Accordingly, IT IS ORDERED that application File No. I-T-C-94-062 IS GRANTED and Sprint is authorized to:

a. lease from Comsat and operate 30 digital satellite circuits between the Shenandoah, Virginia earth station and an appropriate INTELSAT satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in Sudan furnished by Sprint's correspondent in Sudan;

b. own and operate 30 digital circuits in the Shenandoah earth station to be used in conjunction with the satellite space segment capacity;

c. own and operate 30 digital connecting circuits between the Shenandoah earth station and Sprint's New York operating center; and

d. use the facilities described in a, b, and c above for the provision of its authorized services, including switched voice, on a direct basis between the U.S. and Sudan.

e. use previously authorized facilities in the PTAT-1 and TAT-9 cable systems;

f. lease a one-half interest in and operate connecting facilities between the PTAT-1 cable terminal in Brean, United Kingdom, and Sudan via facilities acquired from Mercury in the United Kingdom, France Telecom in France and Italcable in Italy;

g. lease a one-half interest in and operate circuits in the MAT-2 cable from the TAT-9 cable terminal in Conil, Spain to the Italcable cable head in Palermo, Italy and in facilities furnished by Italcable between Italy and Sudan; and

h. use the facilities described in e, f, and g above to provide Sprint's regularly authorized services, including switched voice service, between the U.S. and Sudan on a transiting basis.

3. IT IS FURTHER ORDERED that our authorization of Sprint to provide private lines as part of its regularly authorized services is limited to the provision of such private lines only between the United States and Sudan – that is, private lines which originate in the United States and terminate in Sudan or which originate in Sudan and terminate in the United States. In addition, Sprint may not -- and Sprint's tariff must state that Sprint's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or Sudan end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that Sudan affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991) *petitions for reconsideration pending.*

4. IT IS FURTHER ORDERED that neither Sprint nor any persons or companies directly or indirectly controlling or controlled by Sprint, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which Sprint or any persons or companies controlling or controlled by Sprint are parties.

5. IT IS FURTHER ORDERED that Sprint shall file a copy of any operating agreement it enters into with its foreign correspondents with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. Section 63.15(b).

9. IT IS FURTHER ORDERED that Sprint shall bear one-half the cost of each transiting facility used to provide service, with matching costs paid by Sprint's correspondents.

[1] Sprint has indicated that it will provide service initially on a transiting basis.

10. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

11. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

HUGHES COMMUNICATIONS GALAXY, INC. File No. 25-DSS-ML-93

Application for Modification of the
SBS-4 Domestic Fixed Satellite License

ORDER

Adopted: May 5, 1994; Released: May 11, 1994

By the Chief, Domestic Facilities Division:

1. Hughes Communications Galaxy, Inc. (HCG) has filed an application for authority to operate the SBS-4 domestic fixed-satellite in an inclined orbit mode. GE American Communications, Inc. (GE) filed comments. HCG filed a reply. For the reasons set forth below, HCG's application for modification is granted.

2. The SBS-4 satellite was launched and placed into operation in 1984. It has been operating at 91^0 W.L. since 1985. SBS-4 is scheduled to be replaced at that location by HCG's Galaxy VII(H) satellite. At that time, HCG is to relocate its SBS-4 satellite to the 77^0 W.L. orbital location.[1] Under normal operating conditions, the SBS-4's useful life will extend only to 1994. HCG has requested a modification of its license to operate the SBS-4 satellite in an inclined orbit mode in order to conserve fuel and prolong the operational life of the satellite. HCG states that SBS-4 will continue to be operated as a back-up satellite for its Ku-band fleet and will offer other customer services.

3. In its comments, GE cited a five degree or less excursion limitation found in the International Telecommunications Union's Radio Regulation. In its reply, HCG noted that the ITU has deleted that limitation noting, however, that HCG would accept a limitation on the inclination excursion of SBS-4, if the Commission deemed it necessary.

4. We will permit HCG to operate SBS-4 in an inclined orbit mode, with no inclination excursion limit, thus extending the operational life of the satellite. As HCG noted, the ITU has removed the excursion limitation and we see no reason to impose a limitation on SBS-4's operations. The ITU has determined that the use of an inclined geosynchronous satellite orbit does not affect a satellite's interference potential. Grant of this modification will provide an opportunity for the public to continue receiving services from SBS-4. Therefore, we find that, pursuant to 47 U.S.C. § 309, grant of these applications will serve the public interest, convenience and necessity.

ORDERING CLAUSES

5. Accordingly, IT IS ORDERED that, pursuant to Section 0.291 of the Commission's rules on delegations of authority, 47 C.F.R. § 0.291, Application File No. 25-DSS-ML-93 IS GRANTED and Hughes Communications Galaxy, Inc. IS AUTHORIZED to operate the SBS-4 satellite in an inclined orbit mode.

6. IT IS FURTHER ORDERED that authority to operate the SBS-4 satellite in an inclined orbit mode is subject to the following conditions:

(a) Hughes Communications Galaxy, Inc. shall periodically correct the satellite attitude to achieve a stationary spacecraft antenna pattern on the surface of the Earth and centered on the satellite's designated service area.

(b) Hughes Communications Galaxy, Inc. shall control all interference to adjacent satellites, as a result of operating in an inclined orbit, to levels not to exceed that which would be caused by the satellite network operating without an inclined orbit.

(c) Hughes Communications Galaxy, Inc. can not claim protection in excess of the protection that would be received by the satellite network operating without an inclined orbit.

(d) Hughes Communications Galaxy, Inc. shall continue to maintain the space station at the authorized longitude orbital location in the geostationary satellite arc with the appropriate east-west stationkeeping tolerance.

7. IT IS FURTHER ORDERED that this order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

[1] Hughes Communications Galaxy, Inc., 7 FCC Rcd 7119 (1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

GN Docket No. 93-252

In the Matter of

Implementation of Sections 3(n) and 332
of the Communications Act

Regulatory Treatment of Mobile Services

ERRATUM

Released: May 12, 1994

1. This *Erratum* corrects the final rules in the *Second Report and Order* in the above captioned proceeding, FCC 94-31, which was released on March 7, 1994. The rules have been published correctly in the Federal Register.

2. The final rules are corrected to read as follows.

Adoption of Amendments

47 CFR parts 20, 22, 80, 90, and 99 are amended as follow:

PART 20--COMMERCIAL MOBILE RADIO SERVICES

Authority: Secs. 4, 303, and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, and 332, unless otherwise noted.

1. Part 20 is added to read as follows:

PART 20 COMMERCIAL MOBILE RADIO SERVICES

Section

20.1 Purpose.
20.3 Definitions.
20.5 Citizenship.
20.7 Mobile services.
20.9 Commercial mobile radio service.
20.11 Interconnection to facilities of local exchange carriers.
20.13 State petitions for authority to regulate rates.
20.15 Requirements under Title II of the Communications Act.

Section 20.1 Purpose.

The purpose of these rules is to set forth the requirements and conditions applicable to commercial mobile radio service providers.

Section 20.3 Definitions.

Commercial mobile radio service. A mobile service that is: (a)(1) provided for profit, *i.e.*, with the intent of receiving compensation or monetary gain;

(2) an interconnected service; and

(3) available to the public, or to such classes of eligible users as to be effectively available to a substantial portion of the public; or

(b) the functional equivalent of such a mobile service described in paragraph (a) of this section.

Interconnection or Interconnected. Direct or indirect connection through automatic or manual means (by wire, microwave, or other technologies such as store and forward) to permit the transmission or reception of messages or signals to or from points in the public switched network.

Interconnected service. A service: (a) that is interconnected with the public switched network, or interconnected with the public switched network through an interconnected service provider, that gives subscribers the capability to communicate to or receive communication from all other users on the public switched network; or

(b) for which a request for such interconnection is pending pursuant to Section 332(c)(1)(B) of the Communications Act, 47 U.S.C. § 332(c)(1)(B). A mobile service offers interconnected service even if the service allows subscribers to access the public switched network only during specified hours of the day, or if the service provides general access to points on the public switched network but also restricts access in certain limited ways. Interconnected service does not include any interface between a licensee's facilities and the public switched network exclusively for a licensee's internal control purposes.

Mobile Service. A radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves, and includes:

(a) both one-way and two-way radio communication services;

(b) a mobile service which provides a regularly interacting group of base, mobile, portable, and associated control and relay stations (whether licensed on an individual, cooperative, or multiple basis) for private one-way or two-way land mobile radio communications by eligible users over designated areas of operation; and

(c) any service for which a license is required in a personal communications service under Part 24 of this chapter.

Private Mobile Radio Service. A mobile service that is neither a commercial mobile radio service nor the functional equivalent of a service that meets the definition of commercial mobile radio service. Private mobile radio service includes the following:

(a) Not-for-profit land mobile radio and paging services that serve the licensee's internal communications needs as defined in Part 90 of this chapter. Shared-use, cost-sharing, or cooperative arrangements, multiple licensed systems that use third party managers or users combining resources to meet compatible needs for specialized internal communications facilities in compliance with the safeguards of Section 90.179 of this chapter are presumptively private mobile radio services;

(b) Mobile radio service offered to restricted classes of eligible users. This includes the following services: Public Safety Radio Services; Special Emergency Radio Service; Industrial Radio Services (excluding Business Radio Services that offer customers for-profit interconnected services); Land Transportation Radio Services; and Radiolocation Services;

(c) 220-222 MHz land mobile service and Automatic Vehicle Monitoring systems (Part 90 of this chapter) that do not offer interconnected service or that are not-for-profit; and

(d) Personal Radio Services under Part 95 of this chapter (General Mobile Services, Radio Control Radio Services, and Citizens Band Radio Services); Maritime Service Stations (excluding Public Coast stations) (Part 80 of this chapter); and Aviation Service Stations (Part 87 of this chapter).

Public Switched Network. Any common carrier switched network, whether by wire or radio, including local exchange carriers, interexchange carriers, and mobile service providers, that use the North American Numbering Plan in connection with the provision of switched services.

Section 20.5 Citizenship.

(a) This rule implements Section 310 of the Communications Act, 47 U.S.C. § 310, regarding the citizenship of licensees in the commercial mobile radio services. Commercial mobile radio service authorizations may not be granted to or held by:

(1) Any foreign government or any representative thereof;

(2) Any alien or the representative of any alien;

(3) Any corporation organized under the laws of any foreign government;

(4) Any corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof or by any corporation organized under the laws of a foreign country; or

(5) Any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license.

(b) The limits listed in paragraph (a) of this section may be exceeded by eligible individuals who held ownership interests on May 24, 1993, pursuant to the waiver provisions established in Section 332(c)(6) of the Communications Act. Transfers of ownership to any other person in violation of paragraph (a) of this section are prohibited.

Section 20.7 Mobile services.

The following are mobile services within the meaning of Sections 3(n) and 332 of the Communications Act, 47 U.S.C. §§ 153(n), 332.

(a) Public mobile services (Part 22 of this chapter), including fixed operations that support the mobile systems, but excluding Rural Radio Service and Basic Exchange Telecommunications Radio Service (Subpart H);

(b) Private land mobile services (Part 90 of this chapter), including secondary fixed operations, but excluding fixed services such as call box operations and meter reading;

(c) Mobile satellite services (Part 25 of this chapter) including dual-use equipment, terminals capable of transmitting while a platform is moving, but excluding satellite facilities provided through a transportable platform that cannot move when the communications service is offered;

(d) Marine and aviation services (Parts 80 and 87 of this chapter), including fixed operations that support these marine and aviation mobile systems;

(e) Personal radio services (Part 95 of this chapter), but excluding Interactive Video and Data Service;

(f) Personal communications services (Part 24 of this chapter);

(g) Auxiliary services provided by mobile service licensees, and ancillary fixed communications offered by personal communications service providers;

(h) Unlicensed services meeting the definition of commercial mobile radio service in Section 20.3, such as the resale of commercial mobile radio services, but excluding unlicensed radio frequency devices under Part 15 of this chapter (including unlicensed personal communications service devices).

Section 20.9 Commercial mobile radio service.

(a) The following mobile services shall be treated as common carriage services and regulated as commercial mobile radio services (including any such service offered as a hybrid service or offered on an excess capacity basis to the extent it meets the definition of commercial mobile radio service, or offered as an auxiliary or ancillary service), pursuant to Section 332 of the Communications Act, 47 U.S.C. § 332:

(1) Private Paging (Part 90 of this chapter), excluding not-for-profit paging systems that serve only the licensee's own internal communications needs;

(2) Business Radio Services (Section 90.75 of this chapter) that offer customers for-profit interconnected service;

(3) Land Mobile Systems on 220-222 MHz (Part 90 of this chapter), except services that are not-for-profit or do not offer interconnected service;

(4) Specialized Mobile Radio services that provide interconnected service (Part 90 of this chapter);

(5) Public Coast Stations (Part 80, Subpart J of this chapter);

(6) Public Land Mobile Service (paging, mobile telephone, improved mobile telephone, trunked mobile, and 454 MHz air-ground services) (Part 22, Subpart G of this chapter);

(7) Domestic Public Cellular Radio Telecommunications Service (Part 22, Subpart K of this chapter);

(8) 800 MHz Air-Ground Radiotelephone Service (Part 22, Subpart M of this chapter);

(9) Offshore Radio Service (Part 22, Subpart L of this chapter);

(10) Any mobile satellite service involving the provision of commercial mobile radio service (by licensees or resellers) directly to end users, except that mobile satellite licensees and other entities that sell or lease space segment capacity, to the extent that it does not provide commercial mobile radio service directly to end users, may provide space segment capacity to commercial mobile radio service providers on a non-common carrier basis, if so authorized by the Commission;

(11) Personal Communications Services (Part 24 of this chapter), except as provided in paragraph (b) of this section;

(12) For-profit subsidiary communications services transmitted on subcarriers within the FM baseband signal, that provide interconnected service (47 CFR § 73.295 of this chapter); and

(13) A mobile service that is the functional equivalent of a commercial mobile radio service.

(i) A mobile service that does not meet the definition of commercial mobile radio service is presumed to be a private mobile radio service.

(ii) Any interested party may seek to overcome the presumption that a particular mobile radio service is a private mobile radio service by filing a petition for declaratory ruling challenging a mobile service provider's regulatory treatment as a private mobile radio service.

(A) The petition must show that:

(1) The mobile service in question meets the definition of commercial mobile radio service; or

(2) The mobile service in question is the functional equivalent of a service that meets the definition of a commercial mobile radio service.

(B) A variety of factors will be evaluated to make a determination whether the mobile service in question is the functional equivalent of a commercial mobile radio service, including: consumer demand for the service to determine whether the service is closely substitutable for a commercial mobile radio service; whether changes in price for the service under examination, or for the comparable commercial mobile radio service would prompt customers to change from one service to the other; and market research information identifying the targeted market for the service under review.

(C) The petition must contain specific allegations of fact supported by affidavit(s) of person(s) with personal knowledge. The petition must be served on the mobile service provider against whom it is filed and contain a certificate of service to this effect. The mobile service provider may file an opposition to the petition and the petitioner may file a reply. The general rules of practice and procedure contained in Section 1.1 through Section 1.52 of this chapter shall apply.

(b) Licensees of a Personal Communications Service or applicants for a Personal Communications Service license proposing to use any Personal Communications Service spectrum to offer service on a private mobile radio service basis must overcome the presumption that Personal Communications Service is a commercial mobile radio service.

(1) The applicant or licensee (who must file an application to modify its authorization) seeking authority to dedicate a portion of the spectrum for private mobile radio service, must include a certification that it will offer Personal Communications Service on a private mobile radio service basis. The certification must include a description of the proposed service sufficient to demonstrate that it is not within the definition of commercial mobile radio service in Section 20.3. Any application requesting to use any Personal Communications Service spectrum to offer service on a private mobile radio service basis will be placed on public notice by the Commission.

(2) Any interested party may file a petition to deny the application within 30 days after the date of public notice announcing the acceptance for filing of the application. The petition shall contain specific allegations of fact supported by affidavit(s) of person(s) with personal knowledge to show that the applicant's request does not rebut the commercial mobile radio service presumption. The petition must be served on the applicant and contain a certificate of service to this effect. The applicant may file an opposition with allegations of fact supported by affidavit. The petitioner may file a reply. No additional pleadings will be allowed. The general rules of practice and procedure contained in Section 1.1 through Section 1.52 of this chapter and Section 22.30 of this chapter shall apply.

(c) Any provider of private land mobile service before August 10, 1993 (including any system expansions, modifications, or acquisitions of additional licenses in the same service, even if authorized after this date), and any private paging service utilizing frequencies allocated as of January 1, 1993, that meet the definition of commercial mobile radio service, shall, except for purposes of Section 20.5 (applicable August 10, 1993 for the providers listed in this paragraph), be treated as private mobile radio service until August 10, 1996. After this date, these entities will be treated as commercial mobile radio service providers regulated under this part.

Section 20.11 Interconnection to facilities of local exchange carriers.

(a) A local exchange carrier must provide the type of interconnection reasonably requested by a mobile service licensee or carrier, within a reasonable time after the request, unless such interconnection is not technically feasible or economically reasonable. Complaints against carriers under Section 208 of the Communications Act, 47 U.S.C. Section 208, alleging a violation of this section shall follow the requirements of Sections 1.711-1.734 of this chapter, 47 CFR §§ 1.711-1.734.

(b) Local exchange carriers and commercial mobile radio service providers shall comply with principles of mutual compensation.

(1) A local exchange carrier shall pay reasonable compensation to a commercial mobile radio service provider in connection with terminating traffic that originates on facilities of the local exchange carrier.

(2) A commercial mobile radio service provider shall pay reasonable compensation to a local exchange carrier in connection with terminating traffic that originates on the facilities of the commercial mobile radio service provider.

Section 20.13 State petitions for authority to regulate rates.

(a) States may petition for authority to regulate the intrastate rates of any commercial mobile radio service. The petition must include the following:

(1) Demonstrative evidence that market conditions in the state for commercial mobile radio services do not adequately protect subscribers to such services from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory. Alternatively, a state's petition may include demonstrative evidence showing that market conditions for commercial mobile radio services do not protect subscribers adequately from unjust and unreasonable rates, or rates that are unjustly or unreasonably discriminatory, and that a substantial portion of the commercial mobile radio service subscribers in the state or a specified geographic area have no alternatives means of obtaining basic telephone service This showing may include evidence of the range of basic telephone service alternatives available to consumers in the state.

(2) The following is a non-exhaustive list of examples of the types of evidence, information, and analysis that may be considered pertinent to determine market conditions and consumer protection by the Commission in reviewing any petition filed by a state under this section:

(i) The number of commercial mobile radio service providers in the state, the types of services offered by commercial mobile radio service providers in the state, and the period of time that these providers have offered service in the state;

(ii) The number of customers of each commercial mobile radio service provider in the state; trends in each provider's customer base during the most recent annual period or other data covering another reasonable period if annual data is unavailable; and annual revenues and rates of return for each commercial mobile radio service provider;

(iii) Rate information for each commercial mobile radio service provider, including trends in each provider's rates during the most recent annual period or other data covering another reasonable period if annual data is unavailable;

(iv) An assessment of the extent to which services offered by the commercial mobile radio service providers the state proposes to regulate are substitutable for services offered by other carriers in the state;

(v) Opportunities for new providers to enter into the provision of competing services, and an analysis of any barriers to such entry;

(vi) Specific allegations of fact (supported by affidavit of person with personal knowledge) regarding anti-competitive or discriminatory practices or behavior by commercial mobile radio service providers in the state;

(vii) Evidence, information, and analysis demonstrating with particularity instances of systematic unjust and unreasonable rates, or rates that are unjust or unreasonably discriminatory, imposed upon commercial mobile radio service subscribers. Such evidence should include an examination of the relationship between rates and costs. Additionally, evidence of a pattern of such rates, that demonstrates the inability of the commercial mobile radio service marketplace in the state to produce reasonable rates through competitive forces will be considered especially probative; and

(viii) Information regarding customer satisfaction or dissatisfaction with services offered by commercial mobile radio service providers, including statistics and other information about complaints filed with the state regulatory commission.

(3) Petitions must include a certification that the state agency filing the petition is the duly authorized state agency responsible for the regulation of telecommunication services provided in the state.

(4) Petitions must identify and describe in detail the rules the state proposes to establish if the petition is granted.

(5) States have the burden of proof. Interested parties may file comments in support or in opposition to the petition within 30 days after public notice of the filing of a petition by a state under this section. Any interested party may file a reply within 15 days after the expiration of the filing period for comments. No additional pleadings may be filed. Except for Section 1.45, practice and procedure rules contained in Sections 1.42-1.52 of this chapter shall apply. The provisions of sections 1.771-1.773 of this chapter do not apply.

(6) The Commission shall act upon any petition filed by a state under this paragraph not later than the end of the nine-month period after the filing of the petition.

(7) If the Commission grants the petition, it shall authorize the state to regulate rates for commercial mobile radio services in the state during a reasonable period of time, as specified by the Commission. The

period of time specified by the Commission will be that necessary to ensure that rates are just and reasonable, or not unjustly or unreasonably discriminatory.

(b) States that regulated rates for commercial mobile services as of June 1, 1993, may petition the Commission under this section before August 10, 1994, to extend this authority.

(1) The petition will be acted upon by the Commission in accordance with the provisions of paragraphs (a)(1) through (a)(5) of this section.

(2) The Commission shall act upon the petition (including any reconsideration) not later than the end of the 12-month period following the date of the filing of the petition by the state involved. Commercial mobile radio service providers offering such service in the state shall comply with the existing regulations of the state until the petition and any reconsideration of the petition are acted upon by the Commission.

(3) The provisions of paragraph (a)(7) of this section apply to any petition granted by the Commission under this paragraph.

(c) No sooner than 18 months from grant of authority by the Commission under this section for state rate regulations, any interested party may petition the Commission for an order to discontinue state authority for rate regulation.

(1) Petitions to discontinue state authority for rate regulation must be based on recent empirical data or other significant evidence demonstrating that the exercise of rate authority by a state is no longer necessary to ensure that the rates for commercial mobile are just and reasonable or not unjustly or unreasonably discriminatory.

(2) Any interested party may file comments in support of or in opposition to the petition within 30 days after public notice of the filing of the petition. Any interested party may file a reply within 15 days after the time for filing comments has expired. No additional pleadings may be filed. Except for 1.45 of this chapter, practice and procedure rules contained in Sections 1.42-1.52 of this chapter apply. The provisions of Sections 1.771-1.773 of this chapter do not apply.

(3) The Commission shall act upon any petition filed by any interested party under this paragraph within nine months after the filing of the petition.

Section 20.15 Requirements under Title II of the Communications Act.

(a) Commercial mobile radio services providers, to the extent applicable, must comply with Sections 201, 202, 206, 207, 208, 209, 216, 217, 223, 225, 226, 227, and 228 of the Communications Act, 47 U.S.C §§ 201, 202, 206, 207, 208, 209, 216, 217, 223, 225, 226, 227, 228; part 68 of this chapter, 47 CFR Part 68; and sections 1.701-1.748, and 1.815 of this chapter, 47 CFR §§ 1.701-1.748, 1.815.

(b) Commercial mobile radio service providers are not required to:

(1) File with the Commission copies of contracts entered into with other carriers or comply with other reporting requirements, or with sections 1.781-1.814 and 43.21 of this chapter;

(2) Seek authority for interlocking directors (section 212 of the Communications Act);

(3) Submit applications for new facilities or discontinuance of existing facilities (Section 214 of the Communications Act).

(c) Commercial mobile radio service providers shall not file tariffs for interstate service to their customers, or for interstate access service. Sections 1.771-1.773 and Part 61 of this chapter are not applicable to interstate services provided by commercial mobile radio service providers. Commercial radio service providers shall cancel tariffs for interstate service to their customers and interstate access service.

(d) Nothing in this section shall be construed to modify the Commission's rules and policies on the provision of international service under Part 63 of this chapter.

PART 22--PUBLIC MOBILE SERVICE

2. The authority citation for Part 22 continues to read as follows:

Authority: 47 U.S.C. 154, 303, unless otherwise noted.

3. Section 22.1 is amended by adding paragraph (g) to read as follows:

Section 22.1 Other applicable rule parts.

* * * * *

(g) Part 20 of this chapter which governs commercial mobile radio services which include the following services in this part:

(1) Public Land Mobile;

(2) Offshore Radio Service;

(3) Domestic Public Cellular Radio Telecommunications Service;

(4) 800 MHz Air-Ground Radiotelephone Service.

4. Section 22.13 is amended by removing paragraph (f).

5. Section 22.43 is amended by removing paragraph (b)(2).

6. Section 22.304 is removed.

PART 80--STATIONS IN THE MARITIME SERVICE

7. The authority citation for Part 80 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301-609; 3 UST 3450, 3 UST 4726, 12 UST 2377.

8. Section 80.3 is amended by removing paragraphs (g) through (k), by redesignating paragraphs (f), and (l) through (o) as (g), and (h) through (k), respectively, and by adding new paragraph (f) to read as follows:

Section 80.3 Other applicable rule parts of this chapter.

* * * * *

(f) Part 20 of this chapter which governs commercial mobile radio services which include Subpart J of this part (public coast stations).

* * * * *

PART 90--PRIVATE LAND MOBILE RADIO SERVICE

9. The authority citation for Part 90 continues to read as follows:

Authority: Sections 4, 303, and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, and 332, unless otherwise noted.

10. Section 90.5 is amended by redesignating paragraphs (h) through (j) as paragraphs (i) through (k), respectively, and by adding a new paragraph (h) to read as follows:

Section 90.5 Other applicable rule parts.

* * * * *

(h) Part 20 of this chapter which governs commercial mobile radio service applicable to certain providers in the following services in this part:

(1) Business radio service;

(2) Private paging;

(3) Land mobile service on 220-222 MHz;

(4) Specialized Mobile Radio Service.

* * * * *

11. Part 99 is redesignated as Part 24 to read as follows:

PART 24--PERSONAL COMMUNICATIONS SERVICES

12. The authority citation for Part 24 continues to read as follows:

Authority: Secs. 4, 301, 302, 303, and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 301, 302, 303, and 332, unless otherwise noted.

13. In redesignated Part 24, Section 24.2 is amended by redesignating paragraphs (g) through (i) as paragraphs (h) through (j), respectively, and by adding a new paragraph (g) to read as follows:

Section 24.2 Other applicable rule parts.

* * * * *

(g) Part 20 of this chapter governs commercial mobile radio services.

* * * * *

FEDERAL COMMUNICATIONS COMMISSION

A. Richard Metzger, Jr.
Acting Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Anchorage Telephone Utility — Transmittal No. 78
Revisions to Tariff
F.C.C. No. 5

ORDER

Adopted: May 6, 1994; **Released: May 6, 1994**

By the Chief, Common Carrier Bureau, Tariff Division:

1. On June 9, 1993, the Commission released the *BNA Order*,[1] requiring local exchange carriers (LECs) to file tariffs for the provision of billing name and address information (BNA) to telecommunications service providers (TSPs). The Commission specified that LECs were required to file tariffs for the provision of BNA information of customers with listed telephone numbers on or before September 8, 1993,[2] and in later Orders, specified that tariffs for the provision of BNA associated with unlisted or nonpublished telephone numbers were to be filed on February 23, 1994.[3] The LECs' tariffs for the provision of "listed" BNA have already taken effect.[4]

2. We have already considered most of the general issues raised by petitioners with respect to unlisted BNA tariffs, and we do not specifically list those arguments again here.[5] We have fully considered those arguments as they relate to Anchorage. Separately, General Communication, Inc. (GCI) filed a petition to reject or suspend and investigate the unlisted BNA tariff filed by Anchorage Telephone Utility (Anchorage), which we address here.

3. GCI objects to the provision in Anchorage's tariff would either permit Anchorage to audit the operations, procedures, and systems of BNA purchasers to ensure that they are not using or disclosing BNA in violation of Anchorage's tariff or the Commission's Rules or, as an alternative to audit rights, require TSPs to post a bond of $1 million.[6] GCI also argues that Anchorage fails to state in its tariff that it will reprogram its line information database (LIDB) to indicate which end users have requested that their BNA not be disclosed as required by our Rules. GCI argues that this exposes TSPs to an unreasonable risk of fraud.[7] Finally, GCI asserts that Anchorage has not revised its tariffs to permit BNA use for anything other than billing purposes, and that this violates the Commission's rules.[8]

4. Anchorage explains that it included its audit-or-bond provision to protect itself and its subscribers against misuse or improper disclosure of BNA by a TSP.[9] Anchorage asserts that it has been involved in incidents where TSPs have improperly used or disclosed BNA, and Anchorage's customers have threatened to file lawsuits against it.[10] Anchorage argues that it is not necessary to state every aspect of its LIDB obligations under the rules in its tariff. Anchorage also notes that some other LECs also did not discuss the required LIDB revision in their tariffs, but states that it will revise its tariff to include this language if the Commission decides it should.[11] Anchorage replies that the *BNA Order* allows BNA to be used only for billing and collection, and the *Second BNA Reconsideration Order* permits rather than requires LECs to make BNA available for the other limited purposes described in that Order.[12] Anchorage states that its tariff would make BNA available only for billing to help limit the possibilities for improper use or disclosure of BNA.[13]

5. We have reviewed the BNA tariff and revision filed by Anchorage, as well as all associated pleadings. We conclude that, as revised, Anchorage's tariff is not so patently unlawful as to warrant rejection, and that an investigation is not warranted at this time.

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[1] Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, CC Docket No. 91-115, Second Report and Order, 8 FCC Rcd 4478 (1993) (*BNA Order); on recon.*, Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, Reconsideration and Petitions for Stay, CC Docket No. 91-115, 8 FCC Rcd 6393 (*First BNA Reconsideration Order), on further recon.* 8 FCC Rcd 8798 (1993) (*Second BNA Reconsideration Order), recon. pending.*

[2] *BNA Order*, 8 FCC Rcd at 4487 (para. 45).

[3] In the *First Reconsideration Order*, the Commission extended the deadline for filing tariffs for the provision of the BNA information of customers with nonpublished or unlisted telephone numbers to February 9, 1994. (*First Reconsideration Order*, 8 FCC Rcd at 6393 (para. 3). In the *Second Reconsideration Order*, this deadline was further extended to February 23, 1994. *Second BNA Reconsideration Order*, 8 FCC Rcd at 8810 (para. 69).

[4] *See* Billing Name and Address Tariffs of Local Exchange Carriers, Memorandum Opinion and Order, 8 FCC Rcd 8211 (Com. Car. Bur., Tariff Div. 1993); Nevada Bell, Revisions to Tariff F.C.C. No. 1, Pacific Bell, Revisions to Tariff F.C.C. No. 128, Order, 9 FCC Rcd 351 (Com. Car. Bur., Tariff Div. 1994). For purposes of this Order, we refer to the BNA associated with customers with listed telephone number as "listed BNA," and the BNA associated with customers with unlisted or nonpublished telephone numbers as "unlisted BNA."

[5] Billing Name and Address Tariffs of Local Exchange Carriers For Subscribers with Unlisted or Nonpublished Telephone Numbers, DA 94-400 (Com. Car. Bur., Tariff Div., released Apr. 22, 1994); Pacific Bell, Revisions to Tariff F.C.C. No. 128, DA 94-401 (Com. Car. Bur., Tariff Div., released Apr. 22, 1994). In addition, American Telephone and Telegraph Company (AT&T) and MCI Telecommunications Corporation (MCI) filed separate petitions to reject or suspend and investigate the unlisted BNA tariff filed by Bell Atlantic Telephone Company (Bell Atlantic). The issues raised in these petitions will be considered separately.

[6] GCI Petition at 2-3.

[7] *Id.* at 4, *citing Second BNA Reconsideration Order*, 8 FCC Rcd at 8810 (para. 72).

[8] *Id.* at 4-5.

[9] Anchorage Reply at 2.

[10] *Id.* at 3. On May 5, 1994, Anchorage filed Transmittal No. 84 to remove the "audit-or-bond" provision of which GCI complains. *See* Special Permission No. 94-568, granted May 5, 1994.

[11] Anchorage Reply at 5-6.

[12] *Id.* at 6, *citing BNA Order*, 8 FCC Rcd at 4485; *Second BNA Reconsideration Order*, 8 FCC Rcd at 8805 (para. 39).

[13] *Id.* at 6-7.

6. Accordingly, IT IS ORDERED that the petition for rejection or suspension and investigation filed by General Communication, Inc., against Anchorage Telephone Utilities, Transmittal No. 78, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

GN Docket No. 94-33

In the Matter of

Further Forbearance from
Title II Regulation for Certain Types of
Commercial Mobile Radio Service
Providers

NOTICE OF PROPOSED RULE MAKING

Adopted: April 20, 1994; Released: May 4, 1994

Comment Date: June 27, 1994
Reply Comment Date: July 12, 1994

By the Commission:

I. INTRODUCTION

1. In the *Second Report and Order* in General Docket No. 93-252, the Commission classified all mobile radio services as either commercial mobile radio service (CMRS) or private mobile radio service (PMRS) and determined pursuant to the Omnibus Budget Reconciliation Act of 1993 to forbear from applying Sections 203, 204, 205, 211, 212 and 214 of Title II of the Communications Act to any service classified as CMRS.[1] We determined that the remaining sections of Title II should be enforced with respect to CMRS providers in order to promote competition or to protect consumers, and that this decision would not place an undue burden on any CMRS provider or class of providers. Nevertheless, we also announced that we would consider additional relief in a further rule making that would gather a more extensive record on the potential effect of the remaining sections of Title II on particular types of CMRS providers within each class of service.[2] The purpose of this *Notice* is to initiate that rule making.

2. In implementing revised Section 332, we concluded that CMRS includes the following former private radio services: specialized mobile radio (SMR) licensees that provide interconnected service, private carrier paging,[3] and all for-profit interconnected services offered by business radio service and 220-222 MHz band licensees. It also includes the following common carrier services: cellular service, all air-ground services, common carrier paging, all mobile telephone services and resellers of such services, offshore radio service, public coast stations and providers of mobile satellite service directly to end users.[4] We decided to treat both broadband and narrowband personal communications services (PCS) as CMRS on a presumptive basis, but to allow PCS systems to provide private PCS if they make a showing sufficient to overcome this presumption.[5]

3. The statute establishes a three-year transition period before certain private land mobile licensees who have been reclassified as CMRS become subject to regulations and statutory provisions generally applicable to CMRS providers.[6] Thus, providers of private land mobile service before August 10, 1993, (including any system expansions, modifications, or acquisitions of additional licenses in the same service, even if authorized after this date) and any private paging services using frequencies allocated as of January 1, 1993 that meet the definition of CMRS will not be subject to any provision of Title II before August 10, 1996.[7] CMRS providers not covered by this transition provision, including private land mobile service providers that first became licensees after August 10, 1993, however, are subject to these provisions upon the effective date of our rules implementing the CMRS transition,[8] unless the Commission decides to further forbear.

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[1] Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order, Gen. Docket No. 93-252, FCC 94-31(released March 7, 1994), ¶ ¶ 173-182,196, 272 (*Second Report and Order*); Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b)(2)(A), 6002(b)(2)(B), 107 Stat. 312, 392 (1993) (Budget Act), *to be codified at* 47 U.S.C. §§ 303(n), 332; Communications Act of 1934 *as amended* (Communications Act), §§ 203, 204, 205, 211, 212, 214, 47 U.S.C. §§ 203, 204, 205, 211, 212, and 214. Section 332 defines CMRS as "any mobile service ... that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public." Communications Act, § 332 (d)(1), 47 U.S.C. § 332 (d)(1).

[2] *Second Report and Order*, ¶ ¶ 17, 272, 285 and n.33. *See also* Separate Statement of Commissioner Andrew C. Barrett. We use the term "further forbearance" to refer to forbearance from application of these remaining sections of Title II. Section 332 (c) grants the Commission the authority to forbear from applying any sections of Title II, other than Sections 201, 202, and 208, to some or all CMRS. *Second Report and Order*, ¶ ¶ 86-87, 90-92, 95, 97; 59 Fed. Reg. 18493 (1994) (to be codified at 47 C.F.R. § 20.9).

[3] We excepted, however, private paging systems that service the licensee's internal communications needs but do not offer for-profit service to third-party customers. *Second Report and Order*, ¶ ¶ 97, 269.

[4] *Second Report and Order*, ¶ ¶ 102; 59 Fed. Reg. 18493 (1994) (to be codified at 47 C.F.R. § 20.9). We concluded that we would use our discretion to determine whether the provision of space segment capacity to other than end users by satellite licensees and other entities may be treated as common carriage. *Second Report and Order*, ¶ 270; 59 Fed. Reg. 18493 (to be codified at 47 C.F.R. § 20.9 (a)(10)). We also determined to treat as CMRS for-profit subsidiary communications services transmitted on subcarriers within the FM baseband signal that provide interconnected service. 59 Fed. Reg. 18493 (to be codified at 47 C.F.R. § 20.9 (a)(12)).

[5] 59 Fed. Reg. 18493 (to be codified at 47 C.F.R. § 20.9 (b)).

[6] Budget Act, § 6002(c); Communications Act, § 332 (c)(6), 47 U.S.C. § 332 (c)(6). *See* 59 Fed. Reg. 18493 (to be codified at 47 C.F.R. § 20.9(c)). The exception to this is Section 332 (c)(6), regarding foreign ownership, which becomes effective immediately. Implementation of Section 3 (n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, First Report and Order, Gen. Docket No. 93-252, 9 FCC Rcd 1056 (1994).

[7] 59 Fed. Reg. 18493 (to be codified at 47 C.F.R. § 20.9).

[8] Implementation of Sections 3(n) and 332 of the Communica-

4. The statute gives the Commission discretion to forbear from applying specific provisions of Title II to certain CMRS providers if a three-pronged test is met. Section 332 (c)(1)(A) authorizes the Commission to take forbearance actions if it determines that

> (i) enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly discriminatory;
>
> (ii) enforcement of such provision is not necessary for the protection of consumers; and
>
> (iii) specifying such provision is consistent with the public interest.[9]

The legislative history of this provision indicates that the Commission may distinguish among types of CMRS providers in making this determination. For example, the Conference Report states that "[d]ifferential regulation of commercial mobile services is permissible but is not required in order to fulfill the intent of this section."[10]

5. In the *Second Report and Order*, after analyzing the level of competition in the CMRS marketplace, we exercised our statutory authority to forbear from applying the most burdensome provisions of Title II common carriage regulation to CMRS.[11] We stated, however, that we would seek to avoid the imposition of unwarranted costs or other burdens upon carriers because consumers and the national economy would ultimately benefit from such a course.[12] After considering the nature of the statutory obligations that continue to apply to CMRS, and the character of particular CMRS providers, we seek comment here on whether, within particular services classified as CMRS, there may be types of providers that merit further forbearance from certain Title II requirements. Assuming that further forbearance in a particular case would not adversely affect rates or practices or harm consumers under the first two prongs of the test, we have tentatively identified two factors under the public interest test of the last prong that could serve to guide our determinations here. The first is whether there are differential costs of compliance with the remaining Title II sections that would make further forbearance appropriate for particular types of providers. The second is whether the public interest benefits from application of particular Title II provisions are less for certain types of CMRS providers. Thus, in applying the last prong of the statutory test and determining whether the public interest will be advanced by forbearing for particular types of CMRS providers, we ask commenters to identify (1) the benefits of applying the remaining Title II sections, (2) the costs of complying with the remaining Title II sections, and (3) whether the costs of compliance with any of the remaining sections of Title II outweigh the benefits. In addition, we ask, pursuant to Section 332 (c)(1)(C), whether further forbearance will enhance future CMRS competition from a diversity of entities.[13]

6. We ask commenters to demonstrate actual or projected cost of compliance with each provision of Title II that was not forborne, and the extent to which such costs vary across different types of providers. For example, if the costs of regulation are fixed, it could indicate that small CMRS providers are more likely than other types of CMRS providers to be burdened by the costs of regulation. We ask here whether there are instances where these additional costs outweigh the public interest benefits of applying the statutory provision in issue. We seek specific evidence on the magnitude of any such fixed costs. We also ask how we should define small CMRS for purposes of further forbearance.

II. APPLICATION OF FURTHER FORBEARANCE

7. As mentioned above, in the *Second Report and Order* we determined to forbear from applying Sections 203, 204, 205, 211, 212, and 214 to any CMRS service. It is important to state at the outset that we believe that the forbearance actions taken in the *Second Report and Order* are aimed at fostering vigorous and fair competition among CMRS providers.[14] For example, our decision to forbear from tariffing requirements in Sections 203, 204, and 205 significantly reduces the filing burdens placed upon such providers.[15] Moreover, the statute substantially ameliorates the effect of changed regulatory status upon most formerly private carriers who have been reclassified as CMRS licensees by affording them a three-year transition period. Thus, our initial forbearance decision, together with the statutory three-year transition period to which most formerly private carriers are entitled, substantially reduced the potential burden of complying with new CMRS regulations. This proceeding is taking further steps to make sure that these decisions will have this intended effect.

8. In Section II of this Notice we ask commenters to address (1) how the statutory forbearance test and in particular the cost/benefit analysis we associate with the last prong of the test apply to each remaining Title II provision, (2) how forbearance from applying the provision of Title II would enhance future CMRS competition, (3) how Congressional intent underlying the Title II provision would be affected, (4) how forbearance for particular types of CMRS providers would comport with regulatory symmetry and (5) whether there are other factors or alternatives we should consider in classifying CMRS for further forbearance purposes. For each statutory provision that continues to apply to CMRS, we ask commenters to focus their analysis on whether further forbearance is warranted under the three-part test of Section 332.[16] We ask commenters to evaluate the extent to which regulatory concerns regarding rates, practices and consumer protec-

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tions Act, Regulatory Treatment of Mobile Services, Further Notice of Proposed Rule Making in Gen. Docket No. 93-252 adopted April 20, 1994) (*Further Notice*).

[9] Communications Act, § 332 (c)(1)(A), 47 U.S.C. § 332 (c)(1)(A).

[10] H.R. Conf. Rep. No. 103-213, 103d Cong., 1st Sess. 491 (1993)(*Conference Report*). *See also* Communications Act, § 332 (c)(1)(A), 47 U.S.C. § 332 (c)(1)(A).

[11] *Second Report and Order*, ¶ ¶ 24, 135-54, 162-63, 173-182.

[12] *Second Report and Order*, ¶ 17.

[13] Communications Act, § 332 (c)(1)(C), 47 U.S.C. § 332 (c)(1)(C).

[14] *Second Report and Order*, ¶ 16.

[15] H. R. Rep. No. 103-111, 103d Cong. 1st Sess. 259-60 (1993)(*House Report*); *Second Report and Order*, ¶ ¶ 165-82.

[16] *See supra* para. 4.

tion interests might be jeopardized by further forbearance for small providers. Moreover, we seek comment on how the Commission should compare the benefits of applying the remaining provisions of Title II to those the CMRS marketplace may realize through further forbearance. In connection with the third part of the test, -- the public interest standard -- we ask whether the costs to the provider in applying the remaining Title II provisions outweigh the benefits to the public to be gained in applying them. In addressing this test, we ask interested parties to identify whether there are types of CMRS providers for which application of the statutory provision in question will either pose undue costs or yield no benefits to the public. We also ask interested parties to comment on whether further forbearance from particular statutory provisions would enhance future CMRS competition from a diversity of entities and thus tend to justify a finding that forbearance served the public interest pursuant to 47 U.S.C. § 332(c)(1)(C).[17] We also ask parties, in addressing the application of the three-part test, to give special attention to how the Congressional intent underlying each of the Title II statutory provisions would be effectuated.

9. In addition, we ask interested parties to comment on how forbearance for particular types of CMRS providers would comport with the goal of regulatory symmetry underlying the recent amendments to Section 332,[18] bearing in mind that our forbearance authority permits differential regulation of CMRS providers.[19] Specifically, we seek comment on whether limiting further forbearance to only some CMRS providers would undermine regulatory symmetry and the regulatory scheme established in the *Second Report and Order*. Finally, we ask interested parties to suggest any factors or alternatives that we should consider in classifying CMRS for further forbearance purposes.

A. Section 210: Franks and Passes

10. As the *Second Report and Order* stated, Section 210 is unrelated to Commission or regulatory obligations.[20] Rather, it allows common carriers to issue franks and passes to their employees, and to provide the Government with free service in connection with preparation for national defense. Because this statute eases potential restrictions on carriers, we see no purpose in forbearing from applying it, nor do we view this provision as triggering any special concerns for small businesses. We seek comment on this tentative view.

B. Reservations of Commission Authority: Sections 213, 215, 218, 219, and 220

11. Characterizing the above provisions as primarily reservations of authority, the *Second Report and Order* found it unnecessary to forbear from applying these provisions to CMRS. We also decided, however, that we would take no immediate action to exercise our authority under these statutory sections.[21] Section 213 authorizes the Commission to make valuations of carrier property. Section 215 gives the Commission the authority to examine carrier activities and transactions. Section 218 authorizes the Commission to inquire into the management of a carrier and its owner. Section 219, *inter alia*, authorizes the Commission to require annual reports from carriers. Section 220 gives the Commission the discretion to prescribe the forms of accounts, records, and memoranda to be kept by carriers, as well as depreciation rates. In the absence of further rulemaking by the Commission, none of these provisions imposes affirmative obligations on CMRS providers.[22] Even though these provisions may have no immediate impact on CMRS, we seek comment on whether the potential for increased regulation (and any concomitant costs) might have an adverse economic impact on specific types of providers that is not in the public interest. In particular, we ask commenters to identify the costs of the potential for regulation-- intangible as well as financial -- with these sections of Title II, especially with respect to those costs that may apply uniquely to smaller providers. We also ask interested parties to comment on how further forbearance would affect consumers and the public interest under the three-part forbearance test.

C. Section 223: Obscene, Harassing, Indecent Communications

12. Under Section 223(a) it is a crime to make obscene or harassing telephone calls.[23] Pursuant to Section 223 (b)(1) and (2), it is also a crime, regardless of who initiated the call, to make an obscene telephone communication for commercial purposes, or to make an indecent telephone communication for commercial purposes that is available to (1) any person under 18 or (2) to any nonconsenting person regardless of age.[24] If the carrier collects payments for an adult information provider using the carrier's services, Section 223 (c)(1) forbids a common carrier, to the extent technically feasible, to permit access to an obscene or indecent communication from the telephone of any subscriber who has not previously requested such access.[25]

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[17] Section 332 (c)(1)(C) requires the Commission to report on the state of competition in "various" commercial mobile services, and requires the Commission, in making the determination of whether forbearance will further the public interest, to consider the impact of proposed regulation (or amendment) on competition.47 U.S.C. § 332 (c)(1)(C). This is a separate question from whether existing competition justifies forbearance. Those commenting on using existing or future competition as a classification factor should also address the type of data they believe would establish competition, and provide any available data. Interested parties should also state what they believe the relevant market is, and what share of that market the service, class of provider, or provider in question has.

[18] *House Report* at 259-60 (1993); *Second Report and Order*, ¶ ¶ 13-29.

[19] *See supra* para. 4.

[20] *Second Report and Order*, ¶ 193; Communications Act, § 210, 47 U.S.C. § 210.

[21] *Second Report and Order*, ¶ ¶ 192-193. However, we also conduct an annual review of the CMRS marketplace to determine whether the level of Title II regulation is appropriate. Communications Act § 332 (c)(1)(C), 47 U.S.C. § 332 (c)(1)(C).

[22] Moreover, forbearance would not prohibit the Commission from exercising its powers under these sections. The Commission would, however, have to hold a rule making on rescinding forbearance before using this authority.

[23] Communications Act, § 223 (a), 47 U.S.C. § 223 (a).

[24] Communications Act, § 223 (b)(1), (2), 47 U.S.C. § 223 (b)(1), (2). The statute also provides for civil penalties against those making obscene telephone communications or making indecent telephone communications available to minors.

[25] Communications Act, § 223 (c)(1), 47 U.S.C. § 223 (c)(1). "Adult information provider" is the term used in our decisions for "dial-a-porn" providers. *See, e.g.*, Regulations Concerning Indecent Communications by Telephone, 5 FCC Rcd 4926 (1990).

This requirement, known as "reverse blocking,"or the blocking of all calls to specific adult information provider numbers, applies only if a carrier bills and collects fees for the adult information provider. As a technical matter, then, a CMRS provider subject to this obligation would have to program its switch (should it employ one) to accomplish this blocking.[26]

13. We tentatively reaffirm our general conclusion in the *Second Report and Order* that Section 223 should continue to apply to CMRS.[27] In light of the important public interest in protecting minors embodied in Section 223, and the care taken to tailor our implementing regulations narrowly, we generally believe that Section 223 does not unduly burden any class of CMRS provider.[28] We observe that if a CMRS licensee decided to provide billing services (a non-common carrier service) on behalf of an adult information provider, it would do so voluntarily.[29] It is this voluntary business decision that would subject the CMRS provider to obligations to restrict access by minors and nonconsenting persons, including the reverse blocking requirement. Commenters are asked to address the impact of Section 223 on existing and projected CMRS offerings, and in particular, whether CMRS providers are likely to be involved in services that implicate Section 223.

D. Section 225: Telecommunications Relay Services

14. The *Second Report and Order* found that the record there afforded no basis for forbearing from Section 225 requirements for CMRS and added that the issue of contribution to the interstate fund for telecommunications relay service (TRS) was beyond the scope of that proceeding.[30] In this docket, we now seek further information on whether the obligation to provide TRS and to contribute to the interstate TRS Fund should apply to all types of CMRS providers.

15. *Provision of TRS.* Section 225, Title IV of the Americans with Disabilities Act,[31] requires all common carriers providing interstate or intrastate telephone voice transmission service to provide telecommunications services that enable persons with hearing and speech disabilities to communicate with hearing individuals.[32] To accomplish this, each common carrier must provide TRS throughout its service area. TRS permits persons with hearing and speech disabilities to communicate by telephone with persons who do not have such disabilities. TRS facilities are equipped with specialized equipment and staffed by communications assistants (CAs) who relay conversations between people who use text telephones and people who use traditional telephones.[33] Common carriers may select one of several methods of offering TRS, including: (1) individually (by setting up a TRS facility); (2) by designating someone else to provide it; (3) by a competitively selected vendor; or (4) in concert with other carriers.[34] Pursuant to Section 225 the Commission fashioned a comprehensive set of minimum standards, functional requirements, guidelines, and operational procedures for TRS.[35] Thus, if a CMRS licensee provided TRS itself, as opposed to using a third-party provider, the CMRS licensee would have to comply with these minimum mandatory requirements.

16. Section 225 provides for FCC certification of state TRS programs. States seeking certification must meet or exceed the mandatory operational, technical and functional standards set by the Commission. The intent is to provide uniform, nationwide access to telecommunications services to all Americans.[36] All states except Oklahoma received five-year FCC certifications. Providers of TRS in certified centers generally are selected by competitive bidding. Once certified, states enforce the provision of intrastate TRS; however, the FCC is required to assume jurisdiction over intrastate TRS complaints that have not been acted upon within 180 days.[37] Most carriers have elected to designate a TRS provider or to provide TRS in concert with other carriers.[38]

17. Heretofore, pursuant to Section 225, we have required provision of TRS by common carriers providing voice telephone transmission.[39] Section 332, however, makes Title II obligations applicable regardless of the previous common/private carrier dichotomy. For purposes of further forbearance, are there CMRS providers whose market is so specialized, or their customer base or size of operation so small that applying TRS obligations to them

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[26] Under 47 C.F.R. § 64.201, an adult information provider has a defense to an indecency prosecution if the adult information provider has notified the common carrier that the provider is providing indecent material for commercial purposes, and (1) requires credit card payment before transmitting the message; or (2) requires an authorized access or identification code, which has been established by mail, before transmitting the message (with precautions, *inter alia*, that the code is not used by those under 18); or (3) makes the message available only to those with descramblers.

[27] *Second Report and Order*, ¶ 223.

[28] *See*, 135 Cong. Rec. S16177 (daily ed. Nov. 19, 1989)(Senator Helms); Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 126 (1989)(*Sable)* (finding compelling government interest, but rejecting previous version of statute as not sufficiently narrowly tailored to serve such interest); Dial Information Services v. Thornburgh, 938 F. 2d 1535, 1541 (2d Cir. (1991), *cert. denied sub nom.* Dial Information Services Corp. of N.Y. v. Barr, 112 S. Ct. 966 (1992); Information Providers Coalition v. FCC, 928 F.2d 866 (9th Cir. 1991).

[29] The carrier's provision of billing services on behalf of an adult information provider to the adult provider's customers is distinct from a carrier's billing the adult information provider itself for the communications services the carrier renders.

[30] *Second Report and Order*, ¶ 208.

[31] *See* Pub. L. No. 101-336, 104 Stat. 327, 366-69 (July 26, 1990).

[32] Communications Act, § 225, 47 U.S.C. § 225.

[33] The TRS staff and facility may vary in size according to the volume of calls handled.

[34] Communications Act, § 225 (c), 47 U.S.C. § 225 (c).

[35] Communications Act, § 225 (d)(1), 47 U.S.C. §225 (d)(1); 47 C.F.R. § 64.604.

[36] Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990, 6 FCC Rcd 4657 (1991)(*TRS I*).

[37] Communications Act, § 225 (g)(2), 47 U.S.C. § 226 (g)(2).

[38] It appears, from data collected pursuant to the TRS certification process, that there are three interexchange carriers, six local telephone companies, and four other entities providing TRS services in a total of 33 TRS centers.

[39] Communications Act, § 225 (c), 47 U.S.C. § 225 (c); Telecommunications Relay Services, and the Americans with Disabilities Act of 1990, Second Order on Reconsideration and Fourth Report and Order, CC Docket No. 90-571, FCC 93-463, 58 Fed. Reg. 53663 (Oct. 18, 1993), ___ FCC Rcd ___, ¶ 6 (Sept. 29, 1993) (*TRS IV); TRS I*, 6 FCC Rcd at 4660. Satellite services not engaged in voice transmission and one-way paging services are not required to provide TRS.

would not appreciably advance the universal service objectives of Section 225? Would forbearance in such cases meet the test in Section 332? Parties are also asked to address whether the need for forbearance is reduced by providers' ability to designate a third party to provide TRS. We also seek comment on whether there are technical or operational limitations that would make compliance with our TRS technical standards difficult for a particular type of CMRS provider.[40] We ask whether interfacing with a third-party TRS provider would also pose technical difficulties, particularly for those private providers who will be reclassified as CMRS after new technical/operational rules become effective.[41]

18. *TRS Fund.* Pursuant to Section 225, intrastate TRS costs must be recovered from the intrastate jurisdiction. In a state certified TRS program, the state may permit a common carrier to recover the intrastate TRS costs in any manner approved by the state. In order to comply with the statutory mandate that interstate TRS costs be recovered from all interstate subscribers and to ensure that TRS costs are equitably distributed, the Commission adopted a shared-funding mechanism for interstate TRS cost recovery.[42] Under the Commission's shared-funding plan, providers of interstate telecommunications services contribute to a TRS fund, administered on an interim basis by the National Exchange Carrier Association (NECA). The amount of the yearly contribution is a percentage of the carrier's gross interstate revenues. The current factor is .00030.[43] Each carrier must contribute at least $100, even if its share under the actual computation would be less. Thus, carriers with interstate gross revenues of under $333,333, (using a .00030 factor) would have to contribute $100 a year. Each carrier must also file FCC Form 431, TRS Fund Worksheet, and update this form annually. If a carrier does not have to comply with our separations and accounting rules, in order to properly compute its interstate revenues, NECA provides them with a form which tracks the FCC's accounting rules. Payments to eligible TRS providers are based on interstate minutes of use.[44]

19. We have heretofore required all interstate service providers to contribute to the TRS Fund.[45] Contributors must make monetary payments into the Fund, and comply with reporting and filing obligations, including conforming their accounts to the format NECA employs for determination of interstate revenues. However, in light of the small percentage used to calculate the contribution and the low minimum required ($100), we ask whether the burden from the funding and concomitant filing obligations are likely to be significant for any type of CMRS. We also reiterate that providers that do not themselves use TRS facilities are nevertheless required to contribute to the Fund.[46] The objective of requiring contributions is to ensure that TRS costs are widely and equitably distributed. We thus do not believe that the public interest would be furthered by exempting CMRS entirely because they do not use TRS facilities. We seek comment on this view.

E. Section 226: Operator Services

20. The Telephone Operator Consumer Services Improvement Act (TOCSIA), codified at Section 226, protects consumers making interstate operator service calls from phones available to the public or to transient users against unreasonably high rates and anti-competitive practices. It regulates two groups. The first consists of operator service providers (OSPs). These are providers of interstate telecommunications service from phones available to the public or to transient users that give automatic or live assistance for billing or completion to a caller.[47] The second group are aggregators, generally persons that, in the ordinary course of their operations, make telephones available to the public or to transient users of the premises and who use a provider of operator services. OSPs include long distance telephone companies as well as independent providers. Operator services include collect or person-to-person calls, calls billed to a third number, and calls billed to a calling card or credit card. These services may be provided by an automated device as well as by a live operator.[48]

21. *OSPs.* Prior to the passage of TOCSIA, some OSPs failed to identify themselves, charged rates higher than the consumer expected, charged for uncompleted calls, and engaged in "call splashing."[49] TOCSIA and our rules subject an OSP to various identification, disclosure and billing requirements, including the requirement that they "brand", *i.e.*, audibly identify themselves at the beginning of the call and before the consumer incurs any charges for the call.[50] OSPs may not bill for unanswered telephone calls in equal access areas having answer supervision and may not knowingly bill for unanswered telephone calls where equal access is not available.[51] An OSP may not engage in "call splashing," except when the consumer asks to be transferred and is informed prior to incurring any charges that

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[40] 47 C.F.R § 64.604.

[41] *See Further Notice supra.*

[42] 47 U.S.C. § 225 (d)(3)(B). H. R. Conf. Rep. No. 101-596, 101st Cong., 2d Sess. 83 (1990). Telecommunications Relay Services, and the Americans with Disabilities Act of 1990, 8 FCC Rcd 5300, 5302 (1993) (*TRS III*), *appeal pending sub nom.* Telocator, the Personal Communications Industry Ass'n v. FCC, No. 93-1711 (filed Oct. 25, 1993, D.C. Cir.).

[43] Telecommunications Relay Services, and the Americans with Disabilities Act of 1990, CC Docket No. 90-571, DA 94-298, ___ FCC Rcd ___ (released April 5, 1994).

[44] *TRS IV*, ¶ 15; *TRS III*, 8 FCC Rcd at 5305.

[45] Interstate service includes, but is not limited to, the interstate portion of: cellular telephone and paging, mobile radio, operator services, PCS, access (including subscriber line charges), alternative access and special access, packet-switched, WATS, 800, 900, message telephone, private line, telex, telegraph, video, satellite, international intraLATA, and resale services provided by common carriers. *TRS IV*, ¶ 15.

[46] *TRS III*, 8 FCC Rcd at 5302.

[47] 47 U.S.C. § 226 (a)(7). The definition excludes, *inter alia*, completion through the consumer's access code to an existing account of the consumer.

[48] S. Rep. No. 101-439, 101st Cong., 2d Sess. at 2 n.1 (1990) (*TOCSIA Senate Report*).

[49] Call splashing occurs when the OSP transfers a call to another carrier at a location different from the originating consumer and the second carrier cannot tell the originating location, resulting in an incorrect charge to the consumer which is not based on originating location.47 C.F.R. § 64.708.

[50] Communications Act § 226 (b)(1)(A), 47 U.S.C. § 226 (b)(1)(A); 47 C.F.R.§ 64.703(a).

[51] 47 C.F.R. § 64.703 (a). "Equal access" refers to access equivalent to that which AT&T received from the local exchange companies after divestiture. It correlates to a consumer's ability to access an interexchange carrier by dialing "10XXX".

the rates for the call may not reflect the rates from the actual originating location of the call.[52] OSPs must file informational tariffs.[53]

22. *Aggregators*. Prior to the passage of TOCSIA, the aggregator would sometimes restrict operator-assisted calling to an OSP that the aggregator, and not the consumer, chose. The aggregator would often be paid a commission by the OSP.[54] Pursuant to the statute and our rules, aggregators are required to identify and disclose certain information regarding the presubscribed OSP (*i.e.*, the OSP to which operator services calls are routed if the caller does not dial an access code), and to disclose that rate information is available and that the consumer has the right to use an OSP of his or her choice. The aggregator must also ensure (1) that its telephones presubscribed to an OSP allow consumers to use 800 or 950 numbers to obtain access to the OSP of choice, and (2) according to an established implementation schedule, that any of its presubscribed equipment allows the consumer to use equal access (10XXX) codes to access the customer's choice of OSP.[55]

23. The *Second Report and Order* found the record insufficient to justify a finding that forbearance for all CMRS would further the public interest. We seek here to compile a record on the more limited question of whether forbearance from Section 226 for particular classes of CMRS would be justified. Parties advocating forbearance for specific types of provider[56] from the aggregator or OSP rules should explain how such action would meet the three-part test for forbearance under Section 332. In particular, parties should address how the first and second prongs of the test, that rates be just and reasonable and that consumers be adequately protected, would be met.[57] In connection with the third prong, parties should address whether the statute imposes any costs that would be exceptionally difficult for certain types of CMRS provider to bear, and whether forbearance in such case would significantly diminish statutory protections for the public. In particular, we seek comment on whether such costs are likely to prove unduly burdensome for specific types of small CMRS providers.

F. Section 227: Unsolicited Telephone Calls and Facsimile Transmissions

24. Section 227, the Telephone Consumer Protection Act of 1991 (TCPA), restricts the use of automatic telephone dialing systems, artificial or prerecorded voice messages, and telephone facsimile machines to send unsolicited advertisements. TCPA prohibits autodialed and prerecorded voice message calls to emergency lines, health care facilities or similar establishments, and with certain exceptions, numbers (such as cellular numbers) for which the called party is charged for the call.[58]

25. Current TCPA obligations primarily apply to the originator of the unwanted message, *e.g.*, telemarketers.[59] Unless a CMRS provider also engages in telemarketing or sends unsolicited facsimiles or other unwanted communications, the statute generally does not apply to it.[60] The *Second Report and Order* declined to forbear from applying this section to CMRS, noting that most commenters found that this provision offered subscribers significant protections.[61] In so far as small CMRS providers act as originators of unsolicited voice or facsimile transmissions, we do not believe that forbearance for such providers would ade-

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In non-equal access areas, 10XXX access is not available and +" traffic defaults to AT&T. Often, equal access also correlates to the ability to obtain sophisticated features, such as "answer supervision", the signal that the called station or other customer premises equipment emits to tell the telephone company's billing equipment that a call has been answered and that billing should commence. If answer supervision is not available, an OSP may not be able to tell whether a call has been answered and may not be able to bill accurately. It also appears that answer supervision may not be available to all OSPs even in equal access areas. Although the statute refers only to equal access, we have clarified that OSPs in equal access areas that cannot subscribe to answer supervision will be held to a different standard regarding billing for unanswered calls. Policies and Rules Concerning Operator Services Providers, 7 FCC Rcd 3882, 3885-86 (1992).

[52] 47 C.F.R. § 64.703 (a).

[53] TOCSIA Senate Report at 4; H. R. Rep. No. 101-213, 101st Cong. 1st Sess. 2-3, 7 (1989) (*TOCSIA House Report*); 47 U.S.C. § 226 (b), (d)(4), (e), (h); 47 C.F.R. §§ 64.707.

[54] *TOCSIA House Report* 2-3.

[55] 47 U.S.C. § 226 (c); 47 C.F.R. § 64.704 (a),(c). An aggregator must ensure that its charges for access codes (800, 950 or 10XXX) are no greater than charges than for calls using the presubscribed OSP. 47 C.F.R. § 64.705 (b).

[56] *See generally* Petition for a Declaratory Ruling that GTE Airfone, GTE Railfone, and GTE Mobilnet Are Not Subject to the Telephone Operator Consumer Services Improvement Act of 1990, 8 FCC Rcd 6171,6174-76 (Com. Car. Bur. 1993) (*Airfone) recon. pending* (applying TOCSIA to certain mobile services). q

[57] *Cf. Airfone*, 8 FCC Rcd at 6174-75, n.32 (expressing serious concern over charges of aggregator that included long distance service charge, even though the customer might be billed separately by the long distance carrier).

[58] 47 U.S.C. § 227; 47 C.F.R. §§ 64.1200, 64.312. One district court ruling, now on appeal, found that the TCPA restrictions contained in 47 U.S.C. § 227 (b)(1)(B) on automatic voice calls to residential telephone subscribers are unconstitutional. *Moser v. FCC*, 826 F. Supp. 360 (D. Or. 1993), *appeal pending sub nom.* Moser v. FCC, Case No. 93-35686 (filed July 28, 1993 9th Cir.). Pending the outcome of that litigation, we are not seeking to enforce the statutory restriction or our rules governing automatic voice calls in any jurisdiction. All other portions of the TCPA and our rules are valid and are enforceable at this time, including the restrictions on sending unsolicited facsimiles. *See* Destination Ventures v. FCC, Civ. No. 93-737 (D. Or. 1993)(Jan.19, 1994).

[59] TCPA gave the Commission discretion to require a national "do not call" database, which would have imposed certain obligations on local exchange carriers. However, we decided that the costs of such a database would outweigh its benefits. Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 7 FCC Rcd 8752, 8760 (1992), *recon. pending*.

[60] We observe that the issue of whether interexchange carriers who offer broadcast facsimile service should be subject to identification requirements and the restrictions on unsolicited facsimiles is pending before the Commission. *See, e.g.*, Petition for Clarification or Reconsideration of U.S. West Communications, Inc., CC Docket No. 92-90 (filed Nov. 23, 1992). Our tentative views here are made without prejudice to the outcome of that pending proceeding. Broadcast facsimile service refers to a carrier's dissemination of facsimiles, via telephone communications links, to multiple parties on behalf of a customer. It may also include development of a list of recipients for the customer's facsimile.

[61] *Second Report and Order*, ¶ 212.

quately protect consumers' privacy interests under the second prong of the Section 332 test.[62] Moreover, the decision to undertake telemarketing services would be a voluntary business judgment on the part of a CMRS provider. Such telemarketing is not a necessary part of what is generally regarded as CMRS.[63] We also see no public interest benefit under the third prong of the test in permitting CMRS providers, even small ones, to undertake such activities without complying with TCPA. We seek comment on these tentative views.

G. Section 228: Pay-Per-Call Services

26. Section 228 incorporates the Telephone Disclosure and Dispute Resolution Act (TDDRA). That Act governs pay-per-call services (also known as "audiotext" or "900" services). In general, these are information programs for which consumers are usually charged higher than normal transmission rates.[64] The definition is broad enough to cover data services, the charges for which are assessed on the basis of the completion of the call.[65] The Act and our implementing regulations include the following obligations:

27. **Interexchange carriers.** Interexchange carriers, as the carriers who assign the information provider of pay-per-call service a 900 number, must require by contract or tariff that information providers comply with the TDDRA and terminate service if they know the provider is not in compliance. They must provide to federal and state agencies and to all interested persons, a list of the telephone numbers for each pay-per-call service carried, a description of each service and the costs of service and the pay-per-call provider's name, address and telephone number.[66] If they provide billing and collection on behalf of pay-per-call providers (as distinct from billing the pay-per-call provider itself for interexchange service), interexchange carriers must also establish a local toll-free number to answer questions and provide certain information to subscribers. They have obligations to disclose and disseminate certain information directly to consumers or by contract with a LEC, and to establish forgiveness, refund and credit procedures when TDDRA violations are found. An interexchange carrier not providing billing and collection must require that the pay-per-call provider or its billing agents have such procedures in place.[67]

28. **Local exchange carriers.** Local exchange carriers must offer subscribers, where technically feasible,[68] an option to block access to 900 services. They must also tariff the terms and conditions for such blocking.[69]

29. **Common Carriers in general.** (a) *800 Service.* With certain exceptions, information service charges cannot be assessed against callers to 800 and other toll-free numbers. Common carriers must enforce this obligation by contract or tariff. (b) *Collect Calls.* Common carriers may not transmit collect information services that are either at a per-call or per-time-interval charge that is greater than, or in addition to, the charge for the transmission of the call, or have not been affirmatively accepted by the called party. (c) *Payment.* Common carriers are prohibited from disconnecting or interrupting service for failure to remit pay-per-call or similar service charges.[70] Common carriers may not recover the cost of complying with TDDRA requirements from ratepayers.[71]

30. The *Second Report and Order* found that enforcement of TDDRA would not impose any unreasonable burden on CMRS providers and would afford consumers an important protection.[72] We observe in this regard that most of the obligations imposed on carriers under TDDRA (*e.g.*, responsibility for the information provider's compliance with the statute) affect interexchange carriers because they are the carriers who assign 900 numbers to a 900 service. CMRS do not have the ability to do this. Thus, they are not subject to the obligations imposed on interexchange carriers. We seek comment, however, on the extent to which the local exchange carrier obligation to permit subscribers to block access where technically feasible should apply to CMRS, and whether there are particular types of CMRS providers for which such an obligation would be particularly difficult. Would local exchange carriers provide blocking for customers of CMRS providers that interconnect with the public switched network? As stated above, many TDDRA obligations, such as restrictions on disconnection or on transmission of collect pay-per-call charges, are imposed on carriers who bill and collect for 900 services, which is not a common carrier service. We ask for comment on whether this type of voluntary business activity is not essential to provision of CMRS and hence, would not justify forbearance for any type of CMRS.[73]

31. In analyzing application of any of the above TDDRA obligations, we ask commenters to address the three parts of the Section 332 forbearance test. We ask whether the

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[62] *See generally* H. R. Rep. No. 102-317, 102d Cong. 1st Sess. 5, 24-25 (1991).

[63] CMRS entails mobile radio service that is for-profit, interconnected, and provided to the public or a substantial part thereof. Communications Act, § 332 (d)(1), 47 U.S.C. § 332 (d)(1).

[64] Section 228 defines "pay per call" services as (A) any service providing audio information or access to simultaneous voice conversation or which includes the provision of a product, the charges for which are assessed on the basis of completion of the call; (B) for which the caller pays a per-call or per-time interval charge greater than the charge for transmission; and which is accessed through a 900 number. 47 U.S.C. § 228 (i). Policies and Rules Implementing the Telephone Disclosure and Dispute Resolution Act, 8 FCC Rcd 6885, 6893 (1993)(*TDDRA Order*), *recon. pending*.

[65] 47 U.S.C. §228 (i)(1), (f)(3). *TDDRA Order*, 8 FCC Rcd at 6903. However, pursuant to the Act, the Commission has reported to Congress that those data services that are not assessed on the basis of completion of a call or data services provided pursuant to a presubscription or comparable arrangement should not be regulated.

[66] 58 Fed. Reg. 59265 (to be codified at 47 C.F.R. § 64.1509 (a)).

[67] 58 Fed. Reg. 59265 (to be codified at 47 C.F.R. § § 64.1511, 64.1509(b)).

[68] An example of technical infeasibility might be insufficient switching capacity.

[69] 58 Fed. Reg. 59265 (to be codified at 47 C.F.R. § 64.1508).

[70] 58 Fed. Reg. 59265 (to be codified at 47 C.F.R. §§ 64.1503, 64.1505, 64.1507, 64.1510).

[71] 58 Fed. Reg. 59265 (to be codified at 47 C.F.R. § 64.1515). *TDDRA Order*, 8 FCC Rcd at 6902.

[72] *Second Report and Order*, ¶ 213.

[73] *See supra* para.13. We observe that if CMRS provide billing and collection, they are subject to FTC regulations on pay-per-call services, regardless of whether they are common carriers.

TDDRA provisions serve a necessary purpose in enforcing just, reasonable and nondiscriminatory rates. We also ask whether application of Section 228 is required to protect consumers. In particular, we ask whether Section 228 obligations would impose exceptional costs on certain types of CMRS and whether forbearance in such cases would significantly diminish statutory protections to the public. Parties should also address the effect forbearance would have on the TDDRA objectives of promoting the legitimate development of pay-per-call services and protecting consumers from fraudulent and deceptive practices.[74]

III. CMRS PROVIDERS MERITING FURTHER FORBEARANCE

32. In this section we consider alternative methodologies for defining CMRS providers potentially eligible for additional forbearance. First, we emphasize our determination in the *Second Report and Order* that application of Title II as set forth therein is not expected to create any undue burden on any CMRS provider, or on CMRS competition generally.[75] Our threshold question, therefore, is whether any further forbearance is merited at this time. As we have indicated, to the extent that regulatory obligations impose fixed costs, they would place relatively greater burdens on small providers who have less of a revenue base and other resources to support them. We also seek comment on whether there are technical or operational limitations inherent in the services these small businesses provide that may make application of certain of the statutory provisions in question not in the public interest. We also recognize the public interest in maintaining opportunities for small businesses and the role that further forbearance might play in reducing the cost of doing business for them.[76] We thus seek comment on whether the size of the provider may be a basis for defining CMRS eligibility for further forbearance. Finally, we seek comment on whether to consider an analysis of a CMRS provider's customer base as another possible factor in determining the appropriateness of further forebearance. Certain types of CMRS providers, particularly small providers, may serve predominantly business customers who require more advanced communications services and may have relatively greater bargaining power than CMRS customers that make personal use of the service. As a result, the differing needs of business and individual customers could affect our analysis of whether forbearance would reduce benefits to customers. In addition we ask whether there should be a distinction between medium to large business customers, and small businesses. We seek comment on these tentative views.

33. In the ensuing discussion, we seek comment on how to determine which type of provider should be considered "small" for purposes of further forbearance. We ask interested parties to comment on whether any one or any combination of the options we advance below should be applied. We also invite parties to suggest alternatives. In addition, we ask parties to comment on how we might draw on our experience in identifying small carriers in other contexts, *e.g.*, the exemption to the cable-telco cross-ownership rule.[77] Finally, we ask that interested parties provide their views on how we might best implement and enforce any classification scheme. We seek comment on the advantages and disadvantages of the various options we propose with respect to implementation by both the Commission and licensees.[78]

A. Measurement Factors

34. One possible standard for size of business operation on which we invite interested parties to comment is the Small Business Administration (SBA) definition of small entity: an entity with a net worth not in excess of $6 million with average net income after Federal income taxes for the two preceding years not in excess of $2 million.[79] We relied on this standard to define small businesses entitled to preferences under the spectrum auction rules.[80] We believe that these criteria are appropriate for identifying entities entitled to preferred entry into new business ventures, as in the spectrum auction context. We tentatively find, however, that this standard is too generous for purposes of determining which CMRS providers are entitled to relief from remaining Title II obligations, many of which, as discussed above, are designed to protect consumers.[81] We thus ask whether we should employ a more modest income and net worth standard.[82] Those commenters that nevertheless advocate use of this approach should discuss how it would affect the different services comprising CMRS, providing as much data as possible on the number of providers in a particular service that would be eligible for further forbearance under this definition, and how it would affect consumer protection. We might also measure size and scope by a number of objective factors, such as average revenues per subscriber or percent-

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[74] *See, e.g.*, H.R. Rep. No. 102-430, 102d Cong. 1st Sess. 2 (1992)

[75] *Second Report and Order*, ¶ 16.

[76] *Cf. House Report* at 254-55 (1993) (with reference to spectrum auction provisions which passed in same bill as mobile services reclassification, recognizing need to ensure that opportunities for small businesses are maintained).

[77] Communications Act, 47 U.S.C. § 613, 47 U.S.C. § 533; 47 C. F.R. §§ 63.54, 63.55, 63.58 (exemption for rural telephone companies in communities of under 2,500); Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, 7 FCC Rcd 5781, 5856 (1992)(proposing to expand rural telco exemption to population of 10,000).

[78] For example, we suggest below as options the use of certain factors, such as number of customers, that are subject to change. We are particularly concerned that such an approach may prove administratively complex to administer and enforce and create burdensome reporting obligations for licensees. We ask interested parties to comment on these potential drawbacks, and on how they might be alleviated.

[79] 13 C.F.R. § 121.601.

[80] Implementation of Section 309 (j) of the Communications Act, Competitive Bidding, Second Report and Order, PP Docket No. 93-253, FCC- 94-61, ¶ 271 (released Apr. 20, 1994) (*Spectrum Auction Order*).

[81] We found that the alternative standard used by the SBA for telecommunications companies, (that the applicant for SBA assistance, together with affiliates, has less than 1,500 employees) was too liberal for purposes of our spectrum auction rules. *Spectrum Auction Order*, ¶ 273. Similarly, we also tentatively conclude that it is too liberal to use for purposes of further forbearance for CMRS.

[82] Should we ultimately adopt a standard that differs form the SBA's definition noted above, we recognize that we may need to seek approval from the SBA Administrator. *See* 15 U.S.C. § 632 (a); 58 Fed. Reg. 44620 (Aug. 24, 1993).

age of interconnected traffic,[83] average number of customers[84] or for Part 90 licensees, number of mobile units, or average subscriber rate.[85] Interested parties should provide data to demonstrate whether providers within their suggested definition would find the costs of complying with the regulatory obligations outlined in Section II *supra* burdensome and how their recommended definition comports with the statutory factors set forth in Section 332 (c) governing forbearance.

35. We also seek comment on how, if we establish standards applicable to individual providers, should we treat affiliated corporations or operators of systems in more than one geographic area or providers who own multiple small systems.[86] In addition, we seek comment on whether we should attribute ownership of systems that are operated pursuant to an exclusive management contract, and thus not forbear when management contracts are in force.[87] We seek comment on the impact, if any, of industry mergers on application of a size standard. Should a small system's affiliation with a corporation that would yield greater vertical integration disqualify that system from further forbearance? Would a small mobile system necessarily enjoy benefits of scale and scope from an affiliation with, for example, a long distance provider? If so, would such a provider be ineligible for further forbearance?

36. Number of channels would provide an administratively straightforward means of identifying small CMRS entities. We ask for comment on whether number of channels is a workable and rational approach to measuring size of CMRS licensees. Commenters should specify specific types of CMRS providers licensed under Parts 22 and 90 of the Commission's Rules, and suggest numbers of channels that would identify small providers in each mobile radio service. In responding to these questions, we ask commenters to consider the likelihood that channels can be aggregated to form systems that would no longer be operated by a small provider, and how transition to a different level of forbearance would be effectuated. We also seek comment on how licensees conforming to this approach would be affected by the remaining Title II obligations discussed in Section II, and whether their users or competitors would be adversely affected by further forbearance.

37. An analysis of a CMRS provider's customer base, -- *i.e.*, whether its customers subscribe to the service to meet their business communications requirements, as opposed to meeting a personal need for mobile communications service -- may be another possible factor in determining whether to apply further forbearance. To the extent that certain types of CMRS providers predominantly serve business customers -- such as traditional SMR and business radio services -- rather than individual customers, such business customers may have relatively greater bargaining power and information concerning their telecommunications options. In addition, we ask whether we should also distinguish between large and medium-sized and small business customers, on the assumption that small businesses may be more like individual consumers in their bargaining power over telecommunications services. Accordingly, we seek comment on (1) whether to appply an analysis of a CMRs provider's customer base and (2) what factors might contribute to our analysis.

B. Case-by-Case Determination

38. We might also extend further forbearance to particular CMRS providers on a case-by-case basis. Under this approach, providers desiring further forbearance from the remaining provisions of Title II that continue to apply could petition the Commission to forbear in individual circumstances. We believe that Section 332 (c)(1)(A) gives us authority to adopt such an approach, so long as the statutory test of forbearance is satisfied. Thus, petitioners would have to demonstrate that they meet the statutory test for forbearance, as implemented by the rules and policies we establish in this proceeding. We ask for comment on this approach, which we believe is consistent with our previous conclusion that the degree of forbearance adopted in the *Second Report and Order* should not be unduly burdensome for the vast majority of CMRS providers.

C. Implementation

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[83] Studies show that in certain services, revenues per subscriber are substantially higher for interconnected as opposed to non-interconnected service. Merrill Lynch, "SMR in the United States: A Window of Opportunity," (October 1993)(in 1992 the average service revenue per month for a dispatch SMR was $15, while the average revenue per month for an interconnected SMR was $50; average cellular revenues per subscriber for 1992 estimated at $68.68 (CTIA)- $74.08 (Merrill Lynch)). Thus, revenues per subscriber might be correlated to the percentage of interconnected traffic an operator handled. Although an operator's ability to handle interconnected calls subjects the operator to CMRS regulation, we might considering forbearing from full Title II regulation if the percentage of that operator's interconnected traffic was relatively small.

[84] Use of a customer number would seem to ignore systems that yield high subscriber profits. Parties advocating this option should submit data regarding the number of subscribers on systems in the services affected, as well as average revenues per subscriber.

[85] We might, for example, further forbear for operators charging less than half the current average cellular rate. Cellular companies now charge about $65 on average. "SMR in the United States: A Window of Opportunity," *supra* note 83. Such a standard would tend to provide protection for operators offering less sophisticated services. It would exclude from protection, however, high cost services that may not be particularly profitable.

[86] A related question is how much ownership constitutes ownership which would trigger such aggregation. Amendment of the Commission's Rules To Establish New Personal Communications Services, 8 FCC Rcd 7700, 7745-46 (1993); Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-Trafficking Provisions, Second Report and Order, 8 FCC Rcd 8565, 8591-92 (1993) (applying five percent attribution broadcast rule to cable).

[87] 47 C.F.R. §§ 90.401(a),(b); "Private Radio Bureau Reminds Licensees of Guidelines Concerning Operation of SMR Stations Under Management Contracts," Public Notice No. 1932 (Mar. 3, 1988); Applications of Motorola, Inc. for 800 MHz Specialized Mobile Radio Trunked Systems in California, New York, New Jersey, Maryland and Virginia, Order, File Nos. 507505, 507475, 507473, 507333, 507330, 507509, 508813, 508124, 508046, 507477, 507511 (July 30, 1985).

39. If we exercise further forbearance with respect to individual providers, we seek comment on how to enforce our standards efficiently, in terms of both identifying eligible entities and deterring evasive behavior. One option would be to amend our application forms to require certification of compliance with specific standards as part of our revised application form for the mobile services.[88] We could use random staff audits of licensees to determine whether they in fact qualify for further forbearance. A second alternative would be to impose affirmative reporting requirements on small providers. A third option would be to rely on complaints alleging violations of our further forbearance standards. We ask for comment on these and any alternative enforcement methods. We also seek comment on whether existing licensees should have to file a separate certification to be eligible for further forbearance.

IV. ADMINISTRATIVE MATTERS

40. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before June 27, 1994, and reply comments on or before July 12, 1994. To file formally in this proceeding, you must file an original plus four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239), 1919 M Street, N.W., Washington, D.C. 20554. For further information contact Gina Harrison or Susan McNeil, Private Radio Bureau, Land Mobile and Microwave Division, 202-632-7792 and 634-2443, respectively, or Peter Batacan, Common Carrier Bureau, Tariff Division, 202-632-6917.

41. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's rules. *See generally* 47 C.F.R. §§ 1.1202, 1.203, and 1.206(a).

42. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. The IRFA is set forth in Appendix A. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Notice, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this Notice of Proposed Rule Making, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel forAdvocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq* (1981).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[88] *Further Notice*, § III.D.

APPENDIX A

INITIAL REGULATORY FLEXIBILITY ACT STATEMENT

I. *Reason for Action.* In an effort to avoid the imposition of unwarranted costs or other burdens upon carriers, the *Second Report and Order* determined that the Commission would initiate a rule making (the instant proceeding) to determine whether further forbearance from application of Title II provisions to CMRS was necessary.

II. *Objectives of the Action.* We seek here to determine whether to forbear further from imposition of Title II regulation on certain types of CMRS providers, particularly small providers, and how to define small CMRS providers.

III. *Legal Basis.* Communications Act, § 332, 47 U.S.C. § 332.

IV. *Description, potential impact, and number of small entities affected.* We do not have the data at this time to estimate the number of CMRS providers affected by this rule making, but we are herein proposing to reduce regulatory burdens for these providers.

V. *Reporting, record keeping and other compliance requirements.* The proposals under consideration in this Notice include the possibility of new reporting and record keeping requirements for small CMRS providers; however, one of the objectives of this proceeding is to minimize such burdens.

VI. *Federal rules which overlap, duplicate or conflict with these rules.* If adopted, the proposals here in would modify existing rules codified at 47 C.F.R. Part 20 and 47 C.F.R. §§ 1.728-1.734.

VII. *Any significant alternatives minimizing the impact on small entities and consistent with stated objectives.* This Notice proposes to reduce the administrative burdens and costs of compliance with Title II regulation on small CMRS providers.

Before the
Federal Communications Commission
Washington, D.C. 20554

ET Docket No. 94-32

In the Matter of

Allocation of Spectrum Below
5 GHz Transferred from
Federal Government Use

NOTICE OF INQUIRY

Adopted: April 20, 1994; Released: May 4, 1994

Comment Date: June 15, 1994
Reply Comment Date: June 30, 1994

By the Commission:

I. INTRODUCTION

1. The purpose of this proceeding is to seek information on potential applications for 50 megahertz of spectrum that is being transferred immediately from Federal Government to private sector use as required by the Omnibus Budget Reconciliation Act of 1993. The spectrum identified for reallocation by the Department of Commerce is the 50 megahertz at the bands 2390-2400 MHz, 2402-2417 MHz, and 4660-4685 MHz. Our goal in this proceeding is to ensure that spectrum reallocated for private sector use will provide for the introduction of new services and the enhancement of existing services. These new and enhanced services will create new jobs, foster economic growth, and improve access to communications by industry and the American public.

II. BACKGROUND

2. The Omnibus Budget Reconciliation Act of 1993[1] (Reconciliation Act), which was signed into law on August 10, 1993, requires that the Secretary of Commerce identify 200 MHz of spectrum currently allocated for use by Federal Government agencies, for transfer to the FCC for use by the private sector.[2] All of the 200 megahertz of spectrum recommended for reallocation must be located below 5 gigahertz, with at least 100 megahertz of this being below 3 gigahertz.[3] The Reconciliation Act requires that the Secretary of Commerce issue a report within six months of the date of its enactment that makes a preliminary identification of reallocable bands of frequencies that meet criteria established by the Act.[4] The Reconciliation Act further requires the Secretary of Commerce to identify 50 megahertz of the 200 megahertz of spectrum that can be made available for reallocation immediately upon issuance of the preliminary report.[5] At least one-half of the 50 megahertz identified for immediate reallocation must be below 3 gigahertz and all of it must be identified for exclusive non-Federal use. The President must withdraw the assignment to a Federal Government station of any frequency recommended for immediate reallocation within 6 months of release of the preliminary report so that the spectrum is then available for exclusive non-Federal use.[6]

3. In compliance with the provisions of the Reconciliation Act, on February 10, 1994, the Department of Commerce released its report making a preliminary identification of spectrum identified for reallocation.[7] The frequency bands that Commerce has identified for reallocation are listed in Appendix A. Interested parties have 90 days from the release of the Commerce Report, until May 11, 1994, to file comments with the Secretary of Commerce. Commerce must provide the Commission with those comments, after which, the Commission is required

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[1] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6001(a)(3), 107 Stat. 312 (approved August 10, 1993) (Reconciliation Act); *see also* H.R. Rep. No. 103-213, 103rd Cong., 1st Sess. (1993) (Conference Report).

[2] The Communications Act of 1934 authorized the FCC to assign frequencies to all radio stations in the United States except those belonging to the Federal Government. Section 305 of the Communications Act, 47 U.S.C. § 305, authorizes the President to assign frequencies to Federal Government stations. This authority has been delegated to the Assistant Secretary of Commerce for Communications and Information (who is also the Administrator of the National Telecommunications and Information Administration). *See* Pub. Law 102-538, 106 Stat. 3533 (1992).

[3] The Reconciliation Act permits up to 100 megahertz of the spectrum recommended for reallocation to be retained for some use by Federal Government stations (this would be considered "mixed use" spectrum) provided that the Government use is limited to substantially less than the potential use to be made by non-Government stations. Reconciliation Act § 113(b).

[4] In general, the Reconciliation Act requires the Department of Commerce to identify and recommend spectrum that: (1) is allocated for Federal Government use on a primary basis; (2) is not required for the present or identifiable future needs of the Federal Government; (3) can feasibly be made available for private sector use within the next 15 years; (4) if transferred, will not result in cost or loss of service that is excessive in relation to the benefits to the public that may be provided by non-Federal use; and (5) is most likely to have the greatest potential for productive uses and public benefits if allocated for non-Federal use. Reconciliation Act § 113(a). The Reconciliation Act also sets forth specific criteria to be considered in evaluating the effect of reallocation on Federal Government users, including assessing whether the needs of Federal Government users can be met by commercially available substitutes, new technologies, or nonradiating communications systems. In evaluating the potential usefulness of spectrum and the potential benefits to the public, the Commerce Department was directed to consider the proximity of other frequencies already assigned for commercial or other non-Federal use, and the activities of foreign governments in making frequencies available for experimentation or commercial use. The Reconciliation Act also directed the Commerce Department to consider the effect reallocation will have on use of the spectrum by amateur operators and to avoid excessive disruption of use of Federal Government frequencies by amateur radio licensees. Reconciliation Act § 113(c).

[5] Reconciliation Act § 113(e)(2)(A).

[6] *i.e.*, by August 10, 1994. *See* Reconciliation Act § 114(a)(1).

[7] Preliminary Spectrum Reallocation Report, U.S. Department of Commerce, NTIA Special Publication 94-27, February, 1994 (Commerce Report).

to submit to Commerce within 90 days an analysis of those comments together with any other comments and recommendations it deems appropriate. By February 10, 1995, the Secretary of Commerce is required to submit to the President and Congress a final report identifying and recommending the spectrum for reallocation.[8] The Reconciliation Act also requires that, by February 10, 1995, the Commission allocate, and propose regulations to assign, the 50 megahertz of spectrum that is immediately available.[9]

III. DISCUSSION

4. The Department of Commerce has identified 50 megahertz at 2390-2400 MHz, 2402-2417 MHz, and 4660-4685 MHz for immediate reallocation from use by the Federal Government to use by the private sector. Suitable spectrum reallocated for private sector use will go far, if used wisely, to relieve spectrum congestion and provide for new technologies and services. The reallocation of spectrum to private sector use will permit the continued growth and development of advanced communications, creating new high technology jobs and economic growth. Advances in communications will also contribute to the development of the national information infrastructure which will provide American industry and consumers access to rapid and flexible information networks essential to competition in the global market. Accordingly, we seek comment as to the services to which this spectrum should be allocated and on specific rules for use of this spectrum to ensure that this spectrum is used to its maximum potential in achieving these goals.

5. *2390-2400 MHz* This band has been allocated to the government radiolocation service and has been used primarily by the military for radar testing systems and for air-to-ground telemetry systems.[10] This band is currently allocated on a secondary basis for the amateur service. Internationally this band is allocated in Region 2 on a primary basis for the fixed, mobile, and radiolocation services, and on a secondary basis for the amateur service.[11] Although the Department of Commerce has identified this band for immediate reallocation, it expresses concern over the effect of non-Federal use on sensitive Federal operations using adjacent channels. The National Astronomy and Ionospheric Center operates a planetary research radar at Arecibo, Puerto Rico at 2380 MHz. In order to protect adjacent channel operations, the Department of Commerce notes that it may be necessary to place certain limitations on the use of 2390-2400 MHz, as follows:

1) The band should not be used for airborne or space-to-Earth links;

2) Restrictions on terrestrial operations in the vicinity of the Puerto Rico planetary research radar facility may be necessary.[12]

6. *2402-2417 MHz* As with the 2390-2400 MHz band, this band has been allocated on a primary basis to the government radiolocation service and has been used mainly by the military for radar testing. The band is currently allocated for use by industrial, scientific, and medical (ISM) applications[13] and, on a secondary basis, for use by the amateur service; it is also available for use by Part 15 equipment.[14] Internationally this band is allocated in Region 2 for ISM applications, for the fixed, mobile, and radiolocation services on a primary basis, and for the amateur service on a secondary basis. Radio services operating within this band must accept harmful interference which may be caused by ISM applications.[15] ISM equipment operating in this band includes a large number of microwave ovens commonly used in households. Because microwave oven usage is generally centered at 2450 MHz, the Department of Commerce has attempted to minimize the potential for interference caused by microwave oven operations by identifying for reallocation frequencies removed from 2450 MHz.

7. The 2390-2400 MHz and 2402-2417 MHz bands are in the 2300-2450 MHz range referred to as the 13 cm band by the amateur service community. Within this range, the amateur service is currently allocated a total of 70 MHz on a secondary basis. The Department of Commerce has identified 35 MHz of this spectrum for reallocation (25 MHz available immediately). The Department of Commerce expects that the amateur service community can satisfy the majority of its spectrum requirements in the remaining 35 MHz.[16] It also believes that current use of the 13 cm band by amateur stations is light compared to use of bands lower in the spectrum, but notes that use may increase for amateur-satellite, high-speed computer data links, amateur TV, and other wide-band applications. The Department of Commerce states that it excluded the 2400-2402 MHz band from consideration for reallocation in order to protect existing amateur-satellite operations.

8. *4660-4685 MHz* This spectrum is a portion of the 4500-4800 MHz band, which has been used for a variety of Federal fixed and mobile applications throughout the United States.[17] This band is also allocated on a primary basis for the non-government fixed-satellite service space-to-earth links, with use limited to international inter-continental

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[8] *See* Reconciliation Act § 113.

[9] Reconciliation Act § 115(a).

[10] *See* Commerce Report, section 4 at 14-16.

[11] *See* Table of Frequency Allocations, 47 C.F.R. § 2.106.

[12] Commerce Report, section 4 at 14-17.

[13] The allocation to ISM covers the band 2400-2500 MHz.

[14] In the *First Report and Order*, Gen Docket No. 81-413, adopted May 9, 1985, 101 FCC 2d, 419, the Commission adopted rules permitting development and use of spread spectrum systems under Part 15 of the Rules in the bands 902-928 MHz, 2400-2483.5 MHz, and 5725-5850 MHz with up to 1 watt transmitter output power. In 1990, to further encourage the development and implementation of this "exciting new family of technologies" the Commission modified Part 90 of its rules to maximize the flexibility of spread spectrum devices operating under Part 15 of the Rules. The majority of spread spectrum devices today operate in the 902-928 MHz band and provide a wide variety of communications services as well as services such as automated meter reading, inventory control, package tracking and shipping control, alarm devices, local area networks, and cordless phones. Recently, however, spread spectrum equipment including wireless local area networks, a wireless intercom headset, and a cordless phone have been approved for use in the 2400-2483.5 MHz band and it is likely that use of this band by spread spectrum devices will increase.

[15] *See* Table of Frequency Allocations, 47 C.F.R. § 2.106.

[16] Commerce Report, section 5 at 11-12.

[17] Department of Commerce report, section 4 at 31-32.

systems.[18] However, there is currently no non-Government use of this band. Internationally this band is allocated in Region 2 on a primary basis for fixed, fixed-satellite, and mobile services.[19] Additionally, an agreement with Canada requires that certain United States terrestrial line of sight and troposcatter systems be coordinated with Canada. This agreement does permit use of this band by airborne or other mobile stations but requires that such stations protect Canadian systems.[20]

9. *Inquiry* We seek comment on the usefulness of these bands for private sector use. Specifically, we request comment on the following issues.

a) Does the spectrum identified for immediate reallocation have potential for promoting economic growth and competition and enhancing access to services when used in the private sector and, if not, why? What would be the most appropriate non-Federal uses of these bands? Commenters should describe services envisioned for these bands, including appropriate standards and operating rules.[21]

b) What, if any, restrictions should be placed on uses of these bands, including any restrictions that may be necessary to protect operations on adjacent or harmonically-related spectrum? In considering the use of the 2390-2400 MHz band, commenters should discuss the necessity of the limitations suggested by the Department of Commerce for non-Federal use of this band.[22] Commenters should also consider the effect that such restrictions will have on competition and on access to new services.

c) Will the recommended reallocation avoid excessive disruption of existing use of Federal Government frequencies by amateur service licensees? Is the 2 megahertz segment at 2400-2402 MHz that the Department of Commerce excluded from consideration for reallocation sufficient to avoid disrupting existing amateur-satellite operations?

d) Will new non-Federal services in these bands be able to share the spectrum with existing services, especially with amateur operations in the 2390-2400 MHz and 2402-2417 MHz bands, and with the fixed-satellite service in the 4660-4685 MHz band?[23] If yes, what are appropriate technical sharing criteria? What should be the relative status of users? What effect will existing users have on competition and on access to new services?

e) Will non-Federal users be able to effectively use the 2402-2417 MHz band, considering its allocation for use by ISM equipment, and especially considering that a large number of microwave ovens operate in this band? Further, what will be the impact upon use of this band by Part 15 devices? What effect will existing services have on the potential for competition and access to new services? What effect will new services have on competition and access to existing services?

f) The Reconciliation Act has reaffirmed the on-going responsibility of the Commission to consider the spectrum and interoperability needs of the public safety community when making spectrum allocation decisions.[24] We request comment on the utility for public safety communications systems of the spectrum identified for immediate reallocation, including comment on the degree to which the proposed spectrum could help increase the ability of all public safety workers to communicate with each other.

g) In its preliminary report, the Department of Commerce notes that Congress directed the NTIA and FCC to carefully consider the need for interference-free radio spectrum for use by biomedical telemetry devices.[25] Is the spectrum identified for immediate reallocation suitable for such devices? If yes, should special accommodation be made for them?

h) We note that the preliminary report identifies additional spectrum in close proximity to these bands that would become available later. Specifically, the 2300-2310 MHz band, which could be paired with

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[18] The fixed-satellite service has also been subject to case-by-case electromagnetic compatibility analyses. *See* Table of Frequency Allocations, 47 C.F.R. § 2.106.

[19] *See* Table of Frequency Allocations, 47 C.F.R. § 2.106. Use of the fixed-satellite service (space-to-earth) at 4500-4800 MHz is subject to an allotment plan contained at Appendix 30B of the international Radio Regulations.

[20] *See* Sharing Arrangement Between the Department of Communications of Canada and the National Telecommunications and Information Administration of the United States Concerning the Use of the Band 4400-5000 MHz, signed August 29, 1986.

[21] We are including for consideration in this proceeding a Petition for Rule Making, filed December 23, 1993, by the Coalition of Private Users of Emerging Multimedia Technologies (COPE). COPE is a group consisting of a broad range of private land mobile users and user associations, such as the American Petroleum Institute, the Association of Public-Safety Communication Officials-International, Inc., the National Association of Business and Educational Radio, Inc., and the Utilities Telecommunications Council. In its petition, COPE argues that a need exists for an allocation of 75 megahertz of spectrum below 3 GHz for the development of an "Advanced Private Land Mobile Communications Service", which would accommodate the needs of private land mobile radio user communities for new operations such as advanced wireless imaging and decision processing/remote file access systems. COPE specifically suggests that spectrum be reallocated from the Federal Government, and it states that the most likely source of spectrum to accommodate private emerging technology needs lies in the spectrum to be reallocated under the requirements of the Reconciliation Act.

[22] *See* para. 5 *supra*.

[23] Since 4660-4685 MHz will no longer be available for Federal Government use, is it necessary to continue the requirement for case-by-case electromagnetic compatibility analyses for fixed-satellite operations in the band

[24] The Reconciliation Act requires that the FCC, by February 1995, complete a study of current and future spectrum needs of public safety agencies through the year 2010 and develop a specific plan to satisfy those needs. Reconciliation Act at § 6002(a). The Act also requires that, at least biannually, the Chairman of the FCC and the Assistant Secretary of Commerce shall meet to conduct joint spectrum planning with respect to, among other issues, the future spectrum requirements for public safety agencies and spectrum allocation actions necessary to accommodate those needs. *Id.* at § 112.

[25] Commerce Report, section 5 at 12-13.

2390-2400 MHz, is slated to become available in 2 years and the 4635-4660 MHz band, which could be combined with 4660-4685 MHz, is slated to become available in 3 years. We request comment on whether it would be advantageous to delay licensing some of the 50 megahertz of immediately available spectrum so that in a few years larger blocks of spectrum could be made available.[26]

Responses should be as complete as possible and commenters should provide support for their position. This Commission has established the goal of creating a national information infrastructure that will provide access to all as a means of boosting productivity, creating jobs, educating children, and improving the provision of health care. In discussing uses for the spectrum to be reallocated, parties should discuss the contribution that a proposed service can make toward meeting this goal, especially in meeting public interest concerns, such as extending service to unserved or undeserved communities or extending educational opportunities and medical services. They should also discuss the growth potential for the Nation's economy offered by the proposed services. For example, what would be the amount and nature of investment in the national information infrastructure and what employment opportunities would be created as a result of introducing a proposed service?

10. We emphasize that this *Inquiry* is focusing on uses for the three bands available for immediate reallocation and, except where noted, commenters should limit their consideration to these bands. Use of the remaining spectrum identified by the Department of Commerce for delayed reallocation will be considered by the Commission at a later date. However, we encourage interested parties to participate in the Department of Commerce's process to make a final identification of spectrum for reallocation by filing comments with the Department.[27]

IV. PROCEDURAL MATTERS

Comment Dates

11. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before June 15, 1994, and reply comments on or before June 30, 1994. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 239, 1919 M Street, N.W., Washington, DC 20554.

Ordering Clause

12. Authority for issuance of this *Notice of Inquiry* is contained in Sections 4(i), 303(g), 303(r), 332(a), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(g), 303(r), 332(a), and 403.

Contact Person

13. For further information concerning this proceeding, contact Steve Sharkey, Office of Engineering and Technology, (202) 653-8151.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[26] Commenters should take into consideration that the Reconciliation Act requires the Commission to issue licenses pursuant to competitive bidding authority for at least 10 megahertz of transferred spectrum not later than 5 years after its date of enactment. Reconciliation Act § 6002(a), codified as 47 U.S.C. § 309(j)(9).

[27] *See* para. 3 *supra*.

Appendix A

NTIA Preliminary Spectrum Reallocation Plan

Bands Identified for Reallocation	Reallocation Status	Reallocation Schedule
1390-1400 MHz	Exclusive	January 1999
1427-1432 MHz	Exclusive	January 1999*
1670-1675 MHz	Mixed	January 1999**
1710-1755 MHz	Mixed	January 2004
2300-2310 MHz	Exclusive	January 1996
2390-2400 MHz	Exclusive	Immediate
2402-2417 MHz	Exclusive	Immediate
3650-3700 MHz	Mixed	January 1999
4635-4660 MHz	Exclusive	January 1997*
4660-4685 MHz	Exclusive	Immediate

* Protection for a limited number of facilities would be required for an additional period of time.

** Limited immediate use of this spectrum would be considered.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-308

In the Matter of

Amendment of Section 73.202(b),	RM-8383
Table of Allotments,	
FM Broadcast Stations.	
(Butte, Montana)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 21, 1994; Released: May 13, 1994

By the Acting Chief, Allocations Branch:

1. Pursuant to the request of The College of Mineral Sciences and Technology ("petitioner"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 9 FCC Rcd 76 (1994), proposing the substitution of Channel 295A for Channel *218A at Butte, Montana, and reservation of the channel for noncommercial educational use. Supporting comments were filed by the petitioner reiterating its intention to apply for the channel. No other comments were received.

2. As stated in the *Notice*, noncommercial educational stations generally operate within the reserved portion of the FM band (Channels 201-220). Exceptions have been made in cases where the channels in the noncommercial educational band are not available because of foreign allocations (Canadian or Mexican) or potential interference to operations on VHF Television Channel 6. In this case, there are no other noncommercial educational channels available for use at Butte and potential interference to Station KTVM(TV), Channel 6, Butte, Montana, appears to justify the reservation of a channel in the nonreserved band (Channels 221-300) for noncommercial educational use.

3. After a review of the comments, we conclude that the reservation of a commercial channel is justified. No party has expressed an interest in the use of the channel as a commercial facility. Channel 295A can be allotted to Butte, Montana, in compliance with the Commission's minimum distance separation requirements at petitioner's specified site.[1]

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective June 20, 1994, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Butte, Montana	224A, 231C, 238C, *295A

5. IT IS FURTHER ORDERED, That pursuant to the authority contained in Section 316(a) of the Communications Act of 1934, as amended, that the License of Station KMSM-FM, Butte, Montana, IS MODIFIED, to specify operation on Channel *295A subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in License BLED-820107AK except for the channel as specified above. Any changes, except those specified require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with License BLED-820107AK, except for the channel as specified above, and a license application (Form 302) is filed within 10 days of commencement of program tests.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel *295A at Butte are 46-00-43 and 112-33-23.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-40

In the Matter of

Amendment of Section 73.202(b) RM-8456
Table of Allotments,
FM Broadcast Stations.
(Bamberg, South Carolina)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 26, 1994; Released: May 12, 1994

Comment Date: July 5, 1994
Reply Comment Date: July 20, 1994

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Branch Communications ("petitioner"), licensee of Station WWBD(FM), Channel 221A, Bamberg, South Carolina, proposing the substitution of Channel 239A for Channel 221A at Bamberg, and the modification of Station WWBD(FM)'s license accordingly. Petitioner states that it will apply for the channel, if allotted.

2. In support of its proposal, petitioner states that at its presently licensed site, Station WWBD(FM) does not meet the Commission's spacing requirements for operation of full FM Class A facilities at 6.0 kilowatts with an antenna height of 100 meters above the average terrain. However, petitioner claims that the substitution of Channel 239A for Channel 221A at Bamberg would enable Station WWBD(FM) to operate at 6.0 kilowatts and serve a larger area, thereby increasing the number of broadcast signals available to the public in the area, and thus promoting efficient use of the spectrum. Petitioner also states that Channel 239A can be substituted for Channel 221A at Bamberg at its presently licensed site.

3. We believe the public interest would be served by proposing the substitution of Channel 239A for Channel 221A, since it would enable Station WWBD(FM) to provide Bamberg with an improved FM service. An engineering analysis has confirmed that Channel 239A can be allotted to Bamberg in compliance with the Commission's minimum distance separation requirements at the petitioner's (presently licensed site.[1] As requested, we also propose to modify petitioner's license for Station WWBD(FM) to specify operation on Channel 239A. In addition, we will not accept competing expressions of interest for the use of Channel 239A at Bamberg because the procedures outlined in *Modification of FM and TV Licenses*, 98 FCC 2d 916 (1984) and Section 1.420(g) of the Commission's rules, do not apply in this case since no upgrade in facilities is contemplated.[2]

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Bamberg, South Carolina	221A	239A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **July 5, 1994**, and reply comments on or before **July 20, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

William J. Pennington, III
Post Office Box 2506
Pawleys Island, South Carolina 29585
(Counsel for Petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be

[1] The coordinates for Channel 239A at Bamberg are North Latitude 33-18-50 and West Longitude 81-04-43.

[2] The Commission considers channels of the same class to be equivalent unless showings have been made that a station cannot be constructed for reasons such as environmental consequences or air hazards. *See Vero Beach, Florida*, 3 FCC Rcd 1049 (1988), *rev. denied*, 4 FCC Rcd 2184, 2185 (1989).

served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 28, 1994

MEETING HELD TO DISCUSS ROLE OF CABLE IN PROPOSED CHANGES TO THE EMERGENCY BROADCAST SYSTEM

The Federal Communications Commission is nearing completion of a rulemaking proceeding to modernize the present Emergency Broadcast System (EBS). Docket FO 91-171 and FO 91-301. One of the areas under consideration is the inclusion of cable television systems as an equal partner with broadcast stations in a new emergency alerting system. On Wednesday, April 27, 1994, members of the Commission staff met in Washington, D.C. with some of the cable television equipment manufacturers and cable operators that had filed comments in the docket on the integration of cable systems into an alerting system.

The purpose of the meeting was to attempt to clarify and further document the estimated costs of emergency alerting equipment in cable systems. Such costs include the purchase of equipment, and the operation of such an alerting system over the multi-channel cable systems. While the discussions centered upon comments already filed with the Commission, it was hoped that this further discussion would enhance the Commission's understanding of the nuances and details for cable implementation of an alerting system.

An audio recording of the meeting was made and has been placed in the record as a part of the official proceeding in the docket. The public and all interested parties are invited to review this recording which consists of approximately six hours of discussion by the approximately 25 participants.

For further information contact the EBS staff at (202) 632-3906.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Contract Tariff F.C.C. No. 1 — Contract Tariff Transmittal No. 1338

ORDER

Adopted: May 6, 1994; Released: May 6, 1994

By the Chief, Tariff Division, Common Carrier Bureau:

1. On February 7, 1994, AT&T Communications (AT&T) filed the captioned tariff revisions on 14 days' notice pursuant to the Commission's *IXC Order*.[1] That Order establishes streamlined tariff review for filings that are presumed lawful. This filing revises Contract Tariff No. 1, adding language addressing the use of the AT&T name or logo by parties engaged in resale or shared use of AT&T Services. The revisions, as amended, are scheduled to take effect on May 16, 1994.[2]

2. On February 14, 1994, American Telephone Network, Inc. (ATN) filed a petition to reject Transmittal No. 1338. On February 15, 1994, ATN filed an amended petition to reject Transmittal 1338, which was accompanied by a motion for acceptance of its late-filed pleading.[3] On February 22, 1994, the Telecommunications Resellers Association (TRA) filed a petition to reject Transmittal 1338, accompanied by a motion to accept its late-filed petition. AT&T did not file a reply.

3. The Common Carrier Bureau has reviewed AT&T Communications Contract Tariff No. 1, Contract Tariff Transmittal No. 1338 and the related pleadings. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order.

4. Accordingly, IT IS ORDERED that the petitions to reject or suspend and investigate AT&T Communications Contract Tariff F.C.C. No. 1, Transmittal No. 1338, filed by American Telephone Network, Inc., and the Telecommunications Resellers Association, ARE DENIED.

5. IT IS FURTHER ORDERED that the motions to accept the late-filed petitions, filed by American Telephone Network, Inc., and the Telecommunications Resellers Association, ARE GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

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[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, *reconsidered in part*, Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991), *further recon.*, Memorandum Opinion and Order, 7 FCC Rcd 2677 (1992).

[2] On April 20, 1994, AT&T filed Contract Tariff Application Number 302, clarifying Transmittal 1338 to clarify the initially proposed revisions.

[3] The Bureau will grant these motions as no party will be harmed by the delay.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMCAST CABLEVISION OF TALLAHASSEE, INC.

Request for Stay of a Local Order of the City of Tallahassee Pending Appeal

ORDER

Adopted: May 5, 1994; Released: May 9, 1994

By the Acting Chief, Cable Services Bureau:

1. Comcast Cablevision of Tallahassee ("Comcast") filed on March 25, 1994 a Request for Stay of a Rate Order of the City of Tallahassee, Florida ("Tallahassee" or the "City") pending Commission resolution of Comcast's underlying appeal of the local rate order.[1] Comcast's deadline for compliance with the local rate order is May 8, 1994. Tallahassee filed an opposition to the stay petition on April 5, 1994.[2] Comcast filed its appeal of Tallahassee's local rate order on April 8, 1994. Comcast asserts that if a stay of the local rate order is not granted, it will be required to implement on May 8, 1994 refunds to subscribers of about $425,000 for overages charged since September 1, 1993, and will be forced to forego monthly revenues on a going-forward basis of between $50.000 and $85,000.

2. A primary element of Comcast's request for stay of the local rate order centers on Tallahassee's treatment of channels offered by Comcast in an a la carte package.[3] Comcast asserts that the City incorrectly included these services as regulated channels in determining Comcast's regulated rates for basic cable service because Comcast's offering of the package complied with federal rate regulations in effect on September 1, 1993.

3. The a la carte package in question is the subject of a Letter of Inquiry currently pending at the Commission.[4] Given that a significant aspect of Comcast's stay petition overlaps closely with issues raised in the Letter of Inquiry and in order to ensure regulatory consistency, we will stay the effective date of Tallahassee's local rate order until the Commission releases a determination concerning the Letter of Inquiry related to this case. At that time, we will advise the parties of the termination date of the stay. In addition, in order to protect the interests of subscribers, we will require Comcast to place in an interest-bearing escrow account the sum Tallahassee has ordered to be refunded, and accumulate in the escrow account the difference between the rates ordered by the City and the prices charged by Comcast as subscriber fees are collected during the stay period. Comcast must furnish the Commission with documentation demonstrating its compliance with this order within thirty (30) days of the release of this order. Finally, Comcast must notify all subscribers of the possibility that they may receive a refund, and advise subscribers who may be planning to relocate outside the franchising area to provide Comcast with a forwarding address to which refunds may be delivered.

4. In general, the Commission prefers to leave local regulators' determinations undisturbed, provided that those findings are reasonable. *Rate Regulation*, 8 FCC Rcd 5631 (1993). Until May 15, 1994, franchising authorities do not have the authority to rule on the regulatory treatment of cable operators' a la carte offerings. *See Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, paras. 191-200 (released March 30, 1994); 47 C.F.R. § 76.986. In this light, and because the clarification of our rate regulations occured so recently, we are inclined to be more solicitous in the granting of stays in this initial adjustment period so as to minimize subscriber confusion and maximize regulatory consistency.

5. Accordingly, IT IS ORDERED that the Request for Stay filed by Comcast Cablevision of Tallahassee, Inc. is GRANTED IN PART. Specifically, the effective date of the local rate order adopted by the City of Tallahassee, Florida concerning rates for regulated basic cable service and associated equipment provided by Comcast is STAYED pending resolution by this Commission of a Letter of Inquiry concerning Comcast Cablevision of Tallahassee, Inc. (LOI-93-2). This action is taken by the Acting Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules.

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[1] Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), 47 U.S.C. § 543(b).

[2] Comcast filed on April 15, 1994 a Reply to Tallahassee's Opposition, under cover of a Request for Leave to File, to which Tallahassee filed an Opposition on April 22, 1994. We will deny Comcast's Request for Leave to File and dismiss the underlying Reply because, as Tallahassee notes, Section 1.45(d) of the Commission's rules clearly states that "Replies to oppositions [to stay petitions] should not be filed and will not be considered." We do not believe that Comcast has demonstrated that a waiver of Section 1.45(d) is warranted in this case.

[3] We note that Comcast's stay petition raises several other contentions with respect to Tallahassee's local rate order, including whether the City improperly compared Comcast's actual rates for basic cable service to a figure derived from the benchmark formula, rather than to a figure from the benchmark tables appended to FCC Form 393, as selected by Comcast; whether the City improperly required Comcast to "true-up" its data during the City's period for review of Comcast's initial rates to reflect a system-wide upgrade being performed by Comcast during that period; and whether the City knowingly based the local rate order, and the rates established therein, on mathematically incorrect calculations performed by the City's consultant.

[4] *See* Letter of Inquiry, Comcast Cablevision of Tallahassee, Inc., LOI-93-2 (issued November 17, 1993).

6. IT IS FURTHER ORDERED that the amount of the refunds required in Tallahassee's local rate order, and the amount of the difference between rates ordered by the City and the subscriber fees collected during the stay period, SHALL BE PLACED by Comcast in an interest-bearing escrow account, and that proof of this shall be filed with the commission within thirty (30) days of the release of this order. Interest shall accrue at the prevailing U.S. Internal Revenue Service Rate.

7. IT IS FURTHER ORDERED that Comcast's Request for Leave to File a Reply to Tallahassee's Opposition to Comcast's Request for Stay is DENIED, and Comcast's Reply to Tallahassee's Opposition to Comcast's Request for Stay is DISMISSED.

8. IT IS FURTHER ORDERED that this *Order* IS EFFECTIVE upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Alexandra M. Wilson
Acting Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Part 0 of the
Commission's Rules to reflect
a Reorganization of the Office
of Managing Director and the
Field Operations Bureau

ORDER

Adopted: May 5, 1994; Released: May 13, 1994

By the Managing Director:

1. On March 7, 1994, the Commission adopted proposed changes in the organizations of the Office of Managing Director and the Field Operations Bureau. Implementation of the proposed changes requires amendment to Part 0 of the Commission's Rules and Regulations. In adopting the reorganization the Commission delegated authority to the Managing Director to make the attached editorial changes.

2. In order to increase the effectiveness of the Commission's Continuity of Government (COG) and National Security and Emergency Preparedness (NSEP) activities, they are being integrated within the field infrastructure. This will improve the technical and administrative support to these activities.

3. The amendments adopted herein pertain to agency organization. The prior notice procedure and effective date provisions of Section 4 of the Administrative Procedures Act are therefore inapplicable. Authority for the amendments adopted herein is contained in Sections 4(i) and 5(b) of the Communications Act of 1934, as amended.

4. IT IS ORDERED, effective 30 days after publication in the Federal Register that Part 0 of the Rules and Regulations is amended as set forth in the Appendix hereto.

FEDERAL COMMUNICATIONS COMMISSION

Andrew S. Fishel
Managing Director

FINAL RULES

Part 0 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

PART 0 - COMMISSION ORGANIZATION

1. The authority citation for Part 0 continues to read as follows:

Authority: Sections 5, 48 Stat. 1068, as amended; 47 U.S.C. 155.

2. Section 0.11 is amended by deleting paragraph (a)(10), and redesignating paragraphs (a)(11) and (a)(12) as paragraphs (a)(10) and (a)(11), respectively.

Section 0.11 Functions of the Office

* * * * *

Paragraph (a)(10) is removed and paragraphs (a)(11) and (a)(12) are redesignated as (a)(10) and (a)(11), respectively.

* * * * *

3. Section 0.91 is amended by removing from paragraph (l) the organizational title "Office of Managing Director" and replacing it with the organizational title "Field Operations Bureau" to read as follows:

Section 0.91 Functions of the Bureau

* * * * *

(l) Administers the Telecommunications Service Priority System with the concurrence of the Field Operations Bureau, and resolves matters involving assignment of priorities and other issues pursuant to Part 64 of the rules.

* * * * *

4. Section 0.111 is amended by adding a new paragraph (o) which reads as follows:

Section 0.111 Functions of the Bureau

* * * * *

(o) Under the general direction of the Defense Commissioner, coordinate the defense activities of the Commission, and provide support to the Defense Commissioner with respect to his participation in the Joint Telecommunications Resources Board and the National Security Telecommunications Advisory Committee; including recommendation of national emergency plans and preparedness programs covering Commission functions during national emergency conditions. Support the Chief, Common Carrier Bureau on matters involving assignment of Telecommunications Service Priority System priorities and in the administration of that system. The Chief, Field Operations Bureau, or his designee, acts as FCC Defense Coordinator and principal to the National Communications System.

* * * * *

5. Section 0.182 is amended by removing the section title "Managing Director" and replacing it with the section title "Chief, Field Operations Bureau" to read as follows:

Section 0.182 Chief, Field Operations Bureau

* * * * *

6. Section 0.183 is amended by removing the organizational title "Management Planning and Program Evaluation Office, Office of the Managing Director" and replacing it with the organizational title "Field Operations Bureau" to read as follows:

Section 0.183 Emergency Communications Administration

* * * * *

The Field Operations Bureau coordinates the National Security and Emergency Preparedness (NSEP) activities of the Federal Communications Commission including Continuity of Government Planning and the Emergency Broadcasting System (EBS) and other such functions as may be delegated during a national emergency or activation of the President's war emergency powers as specified in section 706 of the Communications Act; maintains liaison with FCC Bureaus/Offices, other government agencies, the telecommunications industry and FCC licensees on NSEP matters; and, as requested, represents the Commission at NSEP meetings and conferences.

* * * * *

7. Section 0.185 is amended by replacing all references to the title "Managing Director" with the title "Chief, Field Operations Bureau" to read as follows:

Section 0.185 Responsibilities of the bureaus and staff offices

* * * * *

The heads of each of the several bureaus and staff offices, in rendering advice and assistance to the Chief, Field Operations Bureau in the performance of his duties with respect to defense activities will have the following duties and responsibilities:

(a) To keep the Chief, Field Operations Bureau informed of the instigation, progress, and completion of programs, plans, or activities with respect to defense in which they are engaged or have been requested to engage.

(b) To render assistance and advice to the Chief, Field Operations Bureau on matters which relate to the functions of their respective bureaus or staff offices.

(c) ***

(d) ***

* * * * *

8. Section 0.231 is amended by removing paragraphs (a) and (b), removing the [Reserved] designation from paragraph (i), and redesignating paragraphs (c) through (l) as paragraphs (a) through (i).

Section 0.231 Authority delegated

* * * * *

Paragraphs (a) and (b) are removed, the [Reserved] designation is removed from paragraph (i), and paragraphs (c) through (l) are redesignated as paragraphs (a) through (i).

* * * * *

9. Section 0.284 is amended by revising paragraph (a)(4) removing the organizational title "Office of Managing Director" and replacing it with the organizational title "Field Operations Bureau" to read as follows:

Section 0.284 Actions taken under delegated authority

* * * * *

(a) * * *

(4) Matters involving emergency communications, including the issuance of Emergency Broadcast System Authorizations (FCC Form 392)--Field Operations Bureau.

* * * * *

10. Section 0.311 is amended by adding paragraphs (g) and (h) to read as follows:

Section 0.311 Authority delegated

* * * * *

(g) The Chief, Field Operations Bureau, or his designee, is delegated authority to exempt AM, FM, and Television broadcast licensees from the requirement of installing and maintaining the necessary equipment to receive Emergency Action Notifications and Terminations and arranging for either an associated listening watch, or automated alarm, or both. (See Section 73.922 of this chapter).

(h) The Chief, Field Operations Bureau, or his designee, upon securing concurrence of the General Counsel, is delegated authority to execute, in the name of the Commission, all agreements pertaining to the loan of United States Government property to radio station licensees for national defense purposes.

* * * * *

11. Section 0.332 is amended by revising paragraph (d) by removing the organizational title "Office of Managing Director" and replacing it with the organizational title "Field Operations Bureau" to read as follows:

Section 0.332 Actions taken under delegated authority

* * * * *

(d) Matters involving emergency communications--Field Operations Bureau.

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

FCC Form 393: Economists, Inc.

Petition for Waiver of Paragraph 98
of the Third Order on Reconsideration
in MM Docket Nos. 92-266 and 92-262

ORDER

Adopted: May 6, 1994; Released: May 6, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. In this *Order*, we grant a petition filed by Baraff, Koerner, Olender & Hochberg, P.C. (a law firm), the National Cable Television Association, and the Cable Telecommunications Association (collectively "petitioners")[1] seeking on behalf of the law firm's clients and the associations' members a waiver of the Commission's requirement that cable operators submit rate justifications on an actual FCC Form 393, a copy of the actual form, or a copy generated by Commission software.[2] Petitioners also seek relief from the Commission's requirement that, by May 29, 1994, all non-conforming FCC Form 393s previously filed with the Commission be replaced with FCC Form 393s that conform to our rules. Petitioners argue that the Economists, Inc. computer-generated FCC Form 393 that their members and clients used is identical to our form. For the reasons stated below, we grant the requested waiver and determine that any cable operator who has used Economists, Inc.'s computer-generated FCC Form 393 in order to respond to a cable programming service rate complaint filed with the Commission need not replace that filing with an FCC Form 393 by May 29, 1994 as otherwise required by the *Third Reconsideration Order*.[3] However, as described below, because Economists, Inc.'s FCC Form 393s are not labeled as such, cable operators will be required to notify the Commission by May 29, 1994 that their filing was made on an Economists, Inc. form in order to avail themselves of the relief granted by this waiver. We further determine that cable operators may make future filings with the Commission using Economists, Inc.'s version of FCC Form 393.

2. This waiver is limited to Economists, Inc.'s spreadsheet version of FCC Form 393. Operators who used other substitute versions of the form are still required to refile as determined by the *Third Reconsideration Order*. We encourage such operators to use the Commission's spreadsheet version of FCC Form 393, to be released shortly. The exact release date will be announced via a Public Notice.

II. BACKGROUND

3. The *Report and Order and Further Notice of Proposed Rulemaking* released May 3, 1993 in MM Docket No. 92-266 (*"Rate Order"*) set forth the circumstances in which cable operators must file FCC Form 393.[4] In fulfilling the filing requirement, some cable operators have filed their rate justifications on various substitute versions of FCC Form 393. Indeed, our November 10, 1993 *Public Notice* specifically contemplated such substitutes, provided "the form is identical in overall appearance and format to FCC Form 393." Unfortunately, despite the clarity of our Public Notice, review of such filings revealed a wide variety of substitute forms, some computer generated, many of which did not appear "identical in overall appearance and format to FCC Form 393."

4. The Commission considered whether to deem non-standard forms already filed acceptable, but determined that the administrative burden of examining each non-FCC form to ensure that it matched FCC Form 393 line by line and calculation by calculation made this option unfeasible. Accordingly, in the *Third Reconsideration Order*, the Commission concluded that substitute forms are unacceptable and ordered that all rate filings be made on an actual FCC Form 393, a copy of the actual form, or a copy generated by Commission software.[5] It thus concluded that the burden imposed upon cable operators by requiring them to use the official form would not be great, since they may generate the data in whatever form they wish and simply transfer it to the official form.[6] The Commission also noted that this requirement would significantly reduce the processing burden and increase the accuracy of review by regulatory authorities and other interested parties.[7] Pursuant to the *Third Reconsideration Order*, all future rate filings must be made on official forms. Cable operators

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[1] *See* Petition for Waiver ("petition") filed April 28, 1994. Petitioners make their request on behalf of clients and/or members who have filed an FCC Form 393 with the Commission using a computer-generated version supplied by Economists, Inc.

[2] *See Third Order on Reconsideration* in MM Docket Nos. 92-266 and 92-262, FCC 94-40, 59 FR 17961, (April 15, 1994)(*"Third Reconsideration Order"*).

[3] In completing FCC Form 393, cable operators must provide and attach explanations where required on the form. Although we will allow cable operators to make use of Economists, Inc.'s version of FCC Form 393, we note that this approval does not preclude appropriate action for incomplete filings.

[4] "FCC Form 393" is the shorthand name for "Determination of Maximum Initial Permitted Rates for Regulated Cable Programming Services and Equipment," the official form used by cable operators to show that regulated rates charged for the basic service and cable programming services tiers conform with the FCC's benchmark. Cable operators file FCC Form 393 with local franchising authorities in response to notification that the local franchising authority is certified and is regulating basic service tier rates. Cable operators also file FCC Form 393 with the FCC in response to a complaint about rates charged for the cable programming service tiers. *See Rate Order* in MM Docket No. 92-266, FCC 93-177, 8 FCC Rcd 5631 (1993).

[5] *Third Reconsideration Order* at para 97, 59 FR 17961 (April 15, 1994).

[6] *Id.*

[7] *Id.*

who made a benchmark rate filing on a non-FCC form with the Commission prior to May 15, 1994 must refile within 14 days of May 15, 1994 using an official form, a photocopy, or a copy generated by Commission software.[8]

III. PETITION

5. Petitioners state that they have clients and members who, in response to cable programming service rate complaints, filed non-FCC Form 393s with the Commission prior to May 15, 1994.[9] Petitioners assert that the computer-generated version used by their clients and members, which was created by Economists, Inc., is identical to the official form, except for a slight difference in font.[10]

6. Petitioners state that the Commission's reason for requiring operators to refile thus does not apply to those who used the Economists, Inc. form and that this particular substitute FCC Form 393 poses no processing or review difficulties.[11] Accordingly, they state that requiring them to refile would be inconsistent with the FCC's policy of facilitating access to government and the requirements of the Paperwork Reduction Reauthorization Act of 1986.[12]

IV. DISCUSSION

7. The waiver request reveals that many cable operators have made use of the Economists, Inc. form. Petitioners state that Economists, Inc. has supplied approximately 500 copies of the computer-generated form to 500 different cable companies.[13] In view of the unique widespread availability of this particular form, we believe the public interest would best be served by grant of petitioners' waiver request. The grant, of course, is dependent entirely on the fact that careful review of the Economists, Inc. form establishes that it is virtually identical in appearance, format and function to the official form. The data pages are complete as to page and line numbers, data entries, data descriptions and other instructions, and also match the sequence, arrangement, pagination and general appearance of the official form; nothing is omitted. To facilitate review, data boxes and shading are virtually identical. Further, the mathematical calculations performed by the Economists, Inc. software appear to match those of the official form,[14] and are protected from accidental manipulation. For these reasons, the Economists, Inc. spreadsheet adequately addressed our concerns regarding the burdens which would otherwise be encountered by the Commission in reviewing substitute FCC Form 393s. These burdens include verifying that nothing from FCC Form 393 has been omitted; locating data for review; ensuring that cable operators are given substantially the same text as appears on FCC Form 393; and verifying that the form will ordinarily perform the correct calculations.

8. This waiver covers all cable operators who have used Economists, Inc.'s version of FCC Form 393 to make a rate justification with the Commission. Although petitioners represent a limited number of parties, we believe that applying the waiver to all cable operators who used Economists, Inc.'s spreadsheet will best serve subscribers, cable operators, and the Commission by reducing the amount of paperwork involved in reviewing rates. In addition, this is consistent with our own policies and the Paperwork Reduction Reauthorization Act of 1986. Thus, cable operators who have filed with the Commission a completed FCC Form 393 using a version supplied by Economists, Inc. will not be required to refile on an official form or photocopy of an official form within 14 days of May 15, 1994. However, we will require cable operators to notify the Commission in writing by May 29, 1994 that their filing was made on an Economists, Inc. form. In doing so, cable operators are to include sufficient identifying information that the Commission may easily associate the notification with the pertinent rate justification. Such identifying information must include, at a minimum, the community name and community unit identifier number of the cable system about which a complaint has been received and the date on which the cable operator filed an Economists, Inc. form with the Commission. Cable operators who filed with the Commission an unofficial FCC Form 393 that was not supplied by Economists, Inc. must still refile within 14 days of May 15, 1994. In addition, subsequent filings that use the Economists, Inc. spreadsheet must clearly identify themselves as having used that particular spreadsheet and version of the spreadsheet.

9. We note that our approval of the Economists, Inc. spreadsheet applies only to filings with the FCC. We are concerned that some cable operators failed to include accompanying instructions, explanations, benchmark tables, and other supporting information when they filed an official FCC Form 393 or one generated by Economists, Inc.'s spreadsheet with local franchising authorities. In order to ensure that they have all materials necessary to properly understand and coordinate a benchmark rate justification, local franchising authorities still have the option of requiring filings to be refiled on official FCC Forms 393.[15]

V. ORDERING CLAUSE

10. Accordingly, IT IS ORDERED, that the petition for waiver filed by petitioners IS GRANTED to the extent indicated herein.

11. IT IS FURTHER ORDERED that petitioners' clients and/or members, and other cable operators, who have filed with the Commission a completed FCC Form 393 using a spreadsheet program supplied by Economists, Inc. will not be required to refile on an official form or photocopy of an official form within 14 days of May 15, 1994.

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[8] *Third Reconsideration Order* at para 98, 59 FR 17961 (April 15, 1994).

[9] Petition at 1.

[10] Petition at 2-3.

[11] Petition at 3.

[12] Petition at 3-4. *See* 44 U.S.C.A. 101, 3501, 3505.

[13] Petition at 4.

[14] We would note, however, that the Economists, Inc. spreadsheet appears to make cost and revenue allocations based solely on the distribution of subscribers. While this may be a valid assumption in many cases, it is not universally appropriate. Operators who wish to use this program should therefore carefully consider whether these and any other assumptions built into the program reasonably reflect their particular situations.

[15] *See Third Reconsideration Order* at para. 98, 59 FR 17961 (April 15, 1994).

12. IT IS FURTHER ORDERED that such cable operators shall notify the Commission in writing by May 29, 1994 that their filing was made on an Economists, Inc. form. This action is taken by the Chief, Cable Services Bureau, pursuant to 47 C.F.R. § 0.321.

CABLE SERVICES BUREAU

Alexandra M. Wilson
Acting Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-35

In the Matter of

Amendment of Section 73.202(b), RM-8442
Table of Allotments,
FM Broadcast Stations.
(Muscatine, Iowa)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 21, 1994; Released: May 13, 1994

Comment Date: July 5, 1994
Reply Comment Date: July 20, 1994

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Muscatine Communications, Inc. ("petitioner"), requesting the allotment of Channel 226A to Muscatine, Iowa, as the community's second local commercial FM transmission service. Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 226A to Muscatine since an interest has been expressed in providing the community with an additional local aural transmission service. Channel 226A can be allotted to Muscatine in compliance with the Commission's minimum distance separation requirements with a site restriction of 4.8 kilometers (3 miles) south in order to avoid a short-spacing with the licensed site of Station KATF-FM, Channel 225C1, Dubuque, Iowa.[1]

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Muscatine, Iowa	259C1	226A, 259C1

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **July 5, 1994**, and reply comments on or before **July 20, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Howard Weiss, Esq.
Fletcher, Heald and Hildreth
1300 North 17th Street
11th Floor
Rosslyn, Virginia 22209
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202)634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] The coordinates for Channel 226A at Muscatine are North Latitude 41-22-52 and West Longitude 91-04-26. Petitioner proposed coordinates North Latitude 41-23-26 and West Longitude 91-07-03 with a site restriction of 6.3 kilometers (3.9 miles) southwest. However, the Commission generally does not protect a prospective applicant's desired transmitter site for a new allotment if a less restrictive is available, as there is no guarantee that the petitioner will ultimately become the licensee. Therefore, we will not consider petitioner's site, and advance a less restrictive site for the allotment of Channel 226A at Muscatine, Iowa.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-39

In the Matter of

Amendment of Section 73.202(b), RM-8452
Table of Allotments,
FM Broadcast Stations.
(Roseau, Minnesota)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 21, 1994; Released: May 13, 1994

Comment Date: July 5, 1994
Reply Comment Date: July 20, 1994

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Robert M. Obie ("petitioner"), seeking the allotment of Channel 278C2 to Roseau, Minnesota, as that community's second FM broadcast service. Petitioner submitted information in support of the proposal and stated his intention to file an application for Channel 278C2 if the channel is allotted to Roseau.

2. We believe petitioner's proposal warrants consideration. Channel 278C2 can be allotted to Roseau in compliance with the minimum distance separation requirements of the Commission's Rules without a site restriction.[1] Since Roseau is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government will be obtained for this allotment.

3. In view of the fact that the proposed allotment would provide a second local FM broadcast service to Roseau, Minnesota, the Commission believes it would serve the public interest to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Roseau, Minnesota	271C2	271C2, 278C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before July 5, 1994, and reply comments on or before July 20, 1994, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Jerrold Miller
Miller & Miller, P.C.
P.O. Box 33003
Washington, D.C. 20033

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 278C2 at Roseau are 48-50-46 and 95-45-45.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 83-1376

In the Matter of

Integration of Rates and Services for
the Provision of Communications by
Authorized Common Carriers between
the Contiguous States and Alaska, Hawaii
Puerto Rico and the Virgin Islands

FINAL RECOMMENDED DECISION

Adopted: October 26, 1993; Released: October 29, 1993

By the Federal-State Joint Board:

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I. INTRODUCTION

1. In this *Final Recommended Decision* we present a carefully integrated plan to accomplish the objectives, required of this Joint Board, for interstate telecommunications services between Alaska and the contiguous states ("Lower 48") and between Alaska and Hawaii. We believe that this recommendation achieves, and represents the best balancing of, the five objectives guiding resolution of this proceeding: preservation of universal service; continuation of rate integration; maintenance of revenue requirement neutrality; allowance of market-based competitive entry; and the encouragement of increased efficiency. Our recommendation is comprised of carefully balanced elements that are intended to be implemented as a whole. Elimination or significant modification of any one aspect of our overall recommendation could adversely impact achievement of our market structure objectives.

II. EXECUTIVE SUMMARY

2. The Alaska market structure has been under review by this Joint Board for over eight years. After collecting vast volumes of data, receiving extensive comments from interested parties, and reviewing numerous proposals on this subject, we have reached a final recommendation regarding the market structure for Alaska that we believe best balances our identified goals and advances the public interest.

3. We affirm the conclusion in the *Tentative Recommendation* that the Joint Service Arrangement ("JSA") should be terminated, subject to the adoption and implementation of suitable transition mechanisms.[1] We decline to recommend the market structure plans advanced by either Alascom or AT&T, but, instead, recommend an alternative market structure based on that set forth in the *Tentative Recommendation*.

4. Under our recommended market structure, American Telephone & Telegraph Co. ("AT&T") would provide interstate message telephone service and wide area telecommunications service (hereinafter collectively referred to as MTS) between Alaska and the Lower 48 (northbound and southbound) at integrated rates and under the terms and conditions applicable to AT&T's provision of services in the Lower 48. AT&T would also be obligated to furnish MTS between Alaska and Hawaii at integrated rates.

5. After the JSA is terminated, Alascom could offer interstate MTS independently from AT&T under its own tariff and with no obligation to charge AT&T's integrated rates.

6. Services provided to interexchange carriers ("IXCs") by Alascom, Inc. ("Alascom") under tariff would be offered on a non-discriminatory basis at rates that reflect the costs of service. Alascom's tariff would have separate rate schedules for its operations in locations subject to facilities competition and in locations where Alascom has a facilities monopoly. The costs of service in each of these categories would be prepared pursuant to a cost allocation plan developed by Alascom and approved by the Commission.

7. Alascom would continue to provide interstate private line service upon reasonable request under its existing federal tariffing and Section 214 obligations. If AT&T elects to provide interstate private line service to or from Alaska, it would be required to do so under the same rate structures, terms, and conditions that apply to its provision of private line services between other states.

8. The final recommendation would maintain the current cost separations factor for the circuit equipment of Alascom and United Utilities, Inc. ("UUI"). Therefore, the Alaska Fund originally proposed in the *Tentative Recommendation*, would not be required.

9. During a four year transition period, beginning March 1, 1994, AT&T would be required to purchase services from Alascom to meet its MTS obligations. There would be two phases to the transition period with the first phase beginning on March 1, 1994, and the second phase beginning on September 1, 1995. During the first phase, AT&T would continue to obtain services from Alascom under the JSA that currently governs Alaska interstate MTS for one and one-half years. As of September 1, 1995, the JSA would terminate and Alascom's Common Carrier Services would be offered to carrier customers under tariff. During the second phase of the transition period, lasting two and one-half years, AT&T would be required to purchase a fixed amount of service from Alascom, defined as a percentage of a baseline revenue level. This obligation would decline to zero at the end of the second phase.

10. Finally, we recommend a $150 million transition payment (to be made by AT&T in two installments of $75 million each) be applied to reduce Alascom's total plant accounts. We conclude that this is necessary to ensure universal service, and to ensure revenue requirement neutrality.

III. BACKGROUND

A. Rate Integration

11. In the early 1970's, the Commission authorized the private ownership and operation of domestic satellite and earth station facilities and concluded that the distance insensitive nature of satellite transmission costs required rate integration for services between the Lower 48 and certain noncontiguous points that included Alaska.[2] Rate integration for Alaska was accomplished in several steps that included the execution of the JSA between AT&T and Alascom in 1980.[3] In the JSA, Alascom and AT&T entered into a contract to provide MTS services jointly, with Alascom responsible for MTS carriage to, from, and within Alaska, and AT&T responsible for carriage in the Lower 48. AT&T received all MTS revenues and paid all MTS costs of service, including those of Alascom.[4] The JSA also required that the Lower 48 Separations Manual would be applied to Alascom and that Alascom would receive annual, declining transitional supplement payments from AT&T during the transition to full rate integration.[5]

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[1] *Tentative Recommendation And Order Inviting Comments*, CC Docket No. 83-1376, 8 FCC Rcd 3684, 3687 (1993) (*"Tentative Recommendation"*).

[2] "Rate integration" is the Commission policy that was adopted to describe service between the contiguous states and Alaska, Hawaii, Puerto Rico, and the Virgin Islands (noncontiguous points) at rates that are equivalent to those prevailing for comparable distances in the contiguous 48 states. *Establishment of Domestic Communications Satellite Facilities*, 35 FCC 2d 844, 856-57 (Domsat II), *aff'd on recon.*, 38 FCC 2d 665 (1972), *aff'd sub nom. Network Project v. FCC*, 511 F.2d 786 (D.C. Cir. 1975). *See also Integration of Rates and Services*, 61 FCC 2d 380 (1976), *recon. in part*, 65 FCC 2d 324 (1977) (extending rate integration policy to the Virgin Islands).

[3] The JSA was accepted and approved by the Commission in 1981. *Memorandum Opinion and Order* in W-P-C 649 et al., 87 FCC 2d 25 (1981). "The Commission has indicated its full support for the intercarrier settlement agreement submitted to the Federal-State Joint Board and the Commission to resolve separations questions for Alaska and Hawaii." FCC News Release, May 8, 1981, Report No. 16363. The FCC accepted the Joint Board's recommendation in a *Report and Order*, FCC 81-312, July 8, 1981, without qualification of the JSA as an "interim" measure. The Joint Board recommended adoption of the Motion of AT&T and Alascom regarding the JSA as filed. Confusion has arisen because the JSA included an "interim settlements procedure" to provide for the transitional supplement which would "terminate on January 1, 1985 at which time full rate integration will take place." *See* 87 FCC 2d at 20-1.

[4] To implement the rate integration policy, AT&T develops its MTS rates for the total market and files tariffs covering the northbound service offerings to Alaska. Alascom mirrors the AT&T rates and files tariffs covering the southbound service offerings from Alaska. See *Integration of Rates and Services*, 2 FCC Rcd. 2447 (1987), *aff'd sub nom. General Communication, Inc. ("GCI") v. FCC*, No. 87-1112 (D.C. Cir. 1987).

[5] *Memorandum Opinion and Order* in W-P-C 649 et al., 87 FCC 2d 25, 28-29 (1981). Originally, Alaska rate integration was to be achieved by 1985, but in 1984 the Commission extended the final implementation date for rate integration and contin-

12. Several issues arose regarding the long-term relationship between the rate integration and competitive policies for MTS services between the noncontiguous points and the Lower 48. On December 22, 1983, in response to a petition for rulemaking filed by the State of Alaska and the Alaska Public Utilities Commission ("APUC"), the Commission adopted a Notice of Inquiry ("NOI").[6] Comments in response to the NOI raised significant issues that required further analysis. On September 27, 1985, the Commission issued a Notice of Proposed Rulemaking ("NPRM") in CC Docket No. 83-1376 and referred those issues to this Joint Board pursuant to Section 410(c) of the Communications Act.[7] In particular, this Joint Board was asked to consider questions concerning the appropriate market structure for the provision of Alaska MTS to harmonize the Commission's rate integration and competition policies and to recommend any separations changes that might be required to implement that market structure.

B. Joint Board Actions (1986 to 1992)

13. During the course of investigating the issues designated by the Commission, this Joint Board, on numerous occasions, solicited comments, data, and proposals regarding the Alaska interstate market structure. On May 9, 1986, we issued a data request on the costs of Alaska's interstate and intrastate telecommunications services, including a detailed description of then existing market and service arrangements, Alaskan demographic and economic data, and local exchange and interexchange carriers' financial, facilities, and statistical data (historical and projected). The order also asked commenters to address the question of the high cost of Alaska services and to submit market structure proposals.[8] The comments and data filed in response to this order, as well as other documents submitted and issues raised relating to the market structure, were evaluated by the Joint Board.

14. As a result of this analysis the Joint Board issued a *Supplemental Order* on January 3, 1989.[9] The *Supplemental Order* identified the following five objectives to guide resolution of the issues in this proceeding: continuation of rate integration; preservation of universal service; maintenance of jurisdictional revenue requirement neutrality; allowance for market-based competitive entry; and encouragement of increased efficiency. Two alternative conceptual market structure options, Plans A and B, were also identified by this order.

15. The *Supplemental Order* solicited comments on the objectives and the plans and also identified additional, updated data that were to be provided. Commenters were generally supportive of the Joint Board's objectives and were critical of one or both of the proposed plans. Alternative plans were also filed in response to Plans A and B: Alascom filed its Alaska Revenue Cap ("ARC") Plan; AT&T filed a modified Plan B; and the State of Alaska filed its "Cost Plus Incentive Fee Plan."[10]

16. During July 1991, AT&T and Alascom informed the members of the Joint Board that they were in the process of finalizing an agreement to replace the JSA and to resolve outstanding issues.[11] On January 29, 1992, a Joint Petition was filed by AT&T, Alascom, Pacific Telecom Inc., ("PTI") and Telephone Utilities of Alaska, Inc. ("TUA") seeking approval of a Master Agreement ("MA") for the provision of Alaska telecommunications services. On March 4, 1992, the Joint Board issued a Public Notice requesting comments and reply comments on the MA.[12] Pleadings were also invited on a petition by GCI, filed on January 29, 1992, that requested a new proceeding to resolve Alaska market structure issues.

17. In addition to comments and reply comments, the Joint Board received data concerning the MA through responses made to five data requests released between October 4, 1991, and June 25, 1992, by the State Members of the Joint Board. Overland Consulting, Inc. ("Overland"), a consultant hired to assist the Alaska Member of the Joint Board and staff, submitted a Briefing Paper on the MA on July 21, 1992.

18. On August 4, 1992, the State Members of the Joint Board issued a Memorandum of Understanding ("MOU") setting forth their concerns with the MA in light of the objectives set forth in the *Supplemental Order*. In response to the MOU, Alascom, AT&T, GCI, and the State of Alaska each offered modifications or alternatives to the MA. After studying the comments, pleadings, and proposals received in response to the MOU, the State Members, on November 5, 1992, released a document entitled: "Memorandum of Principles - Alaska Market Structure" ("The

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ued the JSA and the transitional supplement payments at 1984 levels. Full rate integration became effective January 1, 1987, at which time AT&T's supplemental payments to Alascom terminated. *Memorandum Opinion and Order*, CC Docket No. 83-1376, RM 4436, FCC 86-602 (released January 2, 1987).

[6] *Notice of Inquiry, Integration of Rates and Services*, CC Docket No. 83-1376, RM 4436, 96 FCC 2d 567 (1984).

[7] *Notice of Proposed Rulemaking*, CC Docket No. 83-1376, RM 4436, FCC 85-520 (released September 27, 1985) at para. 14. That Notice also terminated the inquiry with respect to noncontiguous points other than Alaska (*i.e.*, Hawaii, Puerto Rico, and the Virgin Islands), finding that the comments did not raise any issues concerning the compatibility of rate integration and competition for service to and from those points.

[8] *Order Requesting Data and Inviting Comments*, CC Docket No. 83-1376, RM 4436, FCC 86J-2 (released May 9, 1986); filing dates amended by *Memorandum Opinion and Order*, CC Docket No. 83-1376, (released August 20, 1986). On July 15, 1986, data were filed by Alascom, Alaska Telephone Association ("ATA"), AT&T, GCI, and the State of Alaska. Market structure proposals for Alaska and/or comments were filed by interested parties on December 2, 1986. Opposition comments and reply comments were filed on February 27 and March 27, 1987, respectively.

[9] *Supplemental Order Inviting Comments*, CC Docket No. 83-1376, RM 4436 4 FCC Rcd 395 (1989).

[10] Comments and or data were filed by Alascom, ATA, AT&T, GCI, the Organization for the Protection and Advancement of Small Telephone Companies ("OPASTCO"), the State of Alaska, the State of Hawaii ("Hawaii"), the United States Telephone Association ("USTA"), and UUI between February 27, 1989, and April 13, 1989. Reply Comments were filed by Alascom, ATA, AT&T, GCI, Hawaii, National Exchange Carrier Association, Inc. ("NECA"), the State of Alaska, and UUI between May 5 and May 15, 1989.

[11] Pacific Telecom, Inc. Press Release (July 10, 1991).

[12] Comments were filed by Alascom, ATA, AT&T, Anchorage Telephone Utility ("ATU"), GCI, Hawaii, MCI Telecommunications Corporation ("MCI"), NECA, and Sprint Communications Company L. P. ("Sprint"), the State of Alaska, and UUI between April 16, 1992 and April 20, 1992. Reply Comments were filed by Alascom, ATA, AT&T, GCI, Hawaii, MCI, OPASTCO, and the State of Alaska on May 20, 1992.

State Members' Plan"). The State Members' Plan identified those elements of the MA which they believed were not in the best interest of the public and recommended an alternative market structure.

19. On December 2, 1992, a Public Notice was issued inviting comments on the State Members' Plan.[13] In early 1993, we were notified by AT&T that the parties had elected not to extend the MA and would allow the agreement to expire after January 15, 1993. As a consequence, the MA became moot.[14]

C. Recent Procedural History (1993)

20. On March 31, 1993, AT&T petitioned for termination of the JSA and proposed an alternative Alaska market structure named the Consumer Benefit Plan ("CBP").[15] On May 17, 1993, the Joint Board released the *Tentative Recommendation*.[16] The *Tentative Recommendation* proposed a new market structure for Alaska interstate telecommunications services based on the extensive record that had been developed in this proceeding. The *Tentative Recommendation* required Alascom and AT&T to file plans to implement the Joint Board's recommendations. The *Tentative Recommendation* also invited comments and reply comments on its market structure proposal, the CBP filed by AT&T,[17] and the requested implementation plans.

21. Both the Alascom and the AT&T responses to the requirement for implementation plan(s) were filed on June 7, 1993.[18] Alascom's implementation plan included data regarding the estimated effects of the *Tentative Recommendation* market structure proposal at varying levels of accelerated cost recovery and its preliminary comments regarding the *Tentative Recommendation*. AT&T's filing did not present an implementation plan but, instead, argued that the *Tentative Recommendation* was inadequate and inferior to the CBP.

22. In response to the *Tentative Recommendation*, numerous entities filed comments, reply comments, and motions.[19] In addition, a public hearing was convened on July 1, 1993, in Anchorage, Alaska, to receive testimony from the citizens of Alaska and other interested persons on the *Tentative Recommendation*, the CBP, and the implementation plan filings of Alascom and AT&T.[20] All Members of the Joint Board participated in person or via audio or video teleconference.[21] Also on July 9, 1993, Alascom was requested by the State Members of the Joint Board to provide the underlying data supporting the financial analyses presented in its implementation plan.[22]

23. The record in this proceeding also includes the taped record and a transcript of a hearing convened in Anchorage, Alaska, on August 27, 1993, by members of the Alaska State Legislature's Telecommunications Task Force. The hearing provided an opportunity for a technical briefing and comment on the proposals currently pending before the Joint Board.[23] Alascom, ATA, AT&T, GCI, MCI, and the State of Alaska participated in that hearing.

IV. MARKET STRUCTURE

A. Joint Service Arrangement

1. Introduction

24. The JSA was signed before wide-spread interexchange competition had developed throughout the United States, and was based upon the pre-divestiture, pre-access charge settlement model that was then applied to independent telephone companies. As implemented, the JSA obligated AT&T to pay all of Alascom's interstate MTS related costs on the same pre-divestiture basis that applied to independent telephone companies including the earned rate of return on interstate investment.[24] Although the exact

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[13] Comments on the State Members' Plan were submitted by Alascom, APUC, ATA, AT&T, GCI, MCI, the State of Alaska, and UUI on December 18, 1992. Reply Comments were filed by Alascom, ATA, AT&T, GCI and the State of Alaska on January 15, 1993.

[14] On September 18, 1992, Charles Naftalin submitted an *ex parte* filing indicating that TUA had also filed a Notice of Withdrawal of its companion application pending before the APUC in APUC Docket U-92-9.

[15] AT&T's Petition to Terminate the Joint Service Arrangement, March 31, 1993.

[16] *Tentative Recommendation*, 8 FCC Rcd 3684 (1993).

[17] Alascom had previously filed on April 15, 1993, its opposition to the AT&T proposal in its Initial Response of Alascom, Inc. to AT&T's Petition to Terminate the Joint Service Arrangement.

[18] Response to Request for Implementation Plan of Alascom, Inc. (June 7, 1991); AT&T's Response to Request for an Implementation Plan (June 7, 1993).

[19] Comments dated June 23-28, 1993 were filed by Alascom, ATA, AT&T, ATU, GCI, Hawaii, MCI, NECA, Southwestern Bell Telephone Company ("SWBT"), Sprint, the State of Alaska, and UUI. Reply comments were filed by Alascom, ATA, AT&T, GCI, Hawaii, MCI, Sprint, the State of Alaska, USTA, and UUI between July 9 and 12, 1993. During June, July, and August numerous letters were filed by members of the public regarding the Alaska market structure issues. Motions made in this proceeding include Alascom's Request for Supplementation of Record (June 15, 1993); Motion of Alascom, Inc. (regarding Mr. Pitsch *ex parte* filing), (July 16, 1993); and AT&T's Reply to Motion of Alascom (July 22, 1993).

[20] Representatives of Alascom, the Alaska Federation of Natives, Inc., Anchorage Community Access TV, Inc., AT&T, the City of Anchorage, Cook Inlet Region, Inc., GCI, Teamsters Local 959, as well as other members of the public provided testimony.

[21] An order released on July 9, 1993, provided an opportunity for interested parties to file written responses to the public hearing testimony in order to assure a complete record. *Order*, CC Docket No. 83-1376, DA 93-825 (released July 9, 1993). This Order was in part a response to a Motion of Alascom, Inc. to Schedule Reply Comments filed on June 28, 1993. Alascom's Motion was opposed by GCI on June 29, 1993. Alascom filed its reply to GCI's opposition on June 30, 1993. Alascom, AT&T, GCI, and numerous members of the public filed comments in response to the July 9, 1993, *Order*.

[22] Letters regarding Data Request 6 and Data Request 7, from Lorraine Kenyon, Joint Board Staff, to Vernon Dunham, PTI dated July 9, 1993. A letter by Alascom in response to Requests 6 and 7 was received on July 14, 1993. Data Request 7 was withdrawn on July 19, 1993, after further consideration by the State Members of the Joint Board. Alascom filed Data Request 6 on July 23, 1993.

[23] Commissioner Susan Knowles and staff member Lorraine Kenyon briefed the Telecommunications Task Force on the history of CC Docket 83-1376 and on the *Tentative Recommendation*.

[24] *See generally*, Joint Petition To Approve Master Agreement,

amount has been subject to dispute. AT&T's current costs of meeting its obligations to provide rate integrated MTS service through the JSA exceed the MTS and WATS revenues that AT&T receives from servicing the Alaska market by a significant amount.[25]

25. In the *Tentative Recommendation*, we initially concluded "that the public interest would be better served by terminating the JSA and thereby restructuring the interstate telecommunications market in Alaska to promote competition, open entry, and improve efficiency incentives."[26] We also recognized, however, that an immediate termination of the JSA "could harm carriers and adversely impact the public by accomplishing the goals of competition and efficiency at the expense of the goals of universal service and revenue requirement neutrality."[27] Therefore, we proposed several transition mechanisms to accompany a phase-out of the JSA and requested comments on our plan.

2. Comments

26. In response to the *Tentative Recommendation*, Alascom recommended that the Joint Board continue the existing market structure and JSA, possibly under its previous ARC plan, modified by adoption of an accelerated cost recovery mechanism. AT&T continued to advance its CBP as the best solution to meet the five objectives identified in the *Supplemental Order*. Comments from other parties were generally supportive of the *Tentative Recommendation*, although some parties suggested changes in one or more of the basic elements. The only full support given the ARC Plan and CBP came from their respective sponsors.

3. Discussion

27. We have concluded that, in the current environment, the JSA is not a viable long term market structure and that it should be terminated pursuant to the transition plan described below.[28] We have reached this conclusion after carefully considering the extensive record that has been compiled in this proceeding in the context of our understanding of the competitive forces that operate in the Alaska MTS market and the costs of providing telecommunications services within, to, and from, the Alaska market.

28. As observed in the *Tentative Recommendation*, conditions have changed since the JSA was crafted and approved by the Commission on an interim basis. The JSA is no longer compatible with the development of a competitive, multi-carrier, interexchange market that serves Alaska. For example, the JSA tends to function as a "requirements contract," in which AT&T is required to satisfy all of its MTS service needs through the JSA. Such an arrangement does not facilitate the sale of Alascom services to other interexchange carriers or the purchase of services by AT&T from other carriers.

29. In addition, the JSA does not allow AT&T the same freedom that its competitors enjoy to build or lease facilities to serve Alaska; and the JSA does little to encourage efficiency since Alascom is guaranteed a customer base. As a consequence, we recommend that the FCC terminate the JSA as soon as reasonably possible, subject to the implementation of transition mechanisms that we identify in the order. Our recommendation will ensure that the five objectives guiding development of a revised interstate market structure for Alaska will not be compromised given termination of the JSA. The resulting plan will better serve the public interest than the JSA or any other plan proposed, or considered by, this Joint Board during the course of this extended proceeding.

B. ARC Plan: Retention of the Joint Service Arrangement

1. Introduction

30. The ARC Plan was first introduced by Alascom in its Comments filed April 13, 1989.[29] Alascom contends that its recommended market structure would continue the JSA but would incorporate amendments to resemble closely the price cap regulation of AT&T.[30] Under the ARC Plan, Alascom would develop a baseline revenue cap equal to the previous year's interstate MTS revenue requirements. The cap would be adjusted up or down by applying the same index that is applied to AT&T's capped rates. Thus, Alascom would receive more or less in payments from AT&T under the JSA according to the same productivity factor applied to AT&T and to the other factors in AT&T's index. Alascom would receive an increase or decrease to its cap based on 50% of the value of the annual increase or decrease in southbound traffic compared with the base year. The final adjustment to the previous year's revenue requirements would be to reduce those requirements by the total MTS payments made to Alascom by carriers other than AT&T.[31]

2. Comments

31. After the ARC Plan was proposed in April 1989, GCI and AT&T filed reply comments opposing the plan. It was criticized as insulating Alascom from competition and from incentives for economic efficiency; lacking an "automatic stabilizer" mechanism; failing to assign a portion of the Alaskan support burden to AT&T's competition; and grandfathering Alascom's costs which were perceived as being needlessly high.[32] GCI opposed Alascomx retaining a portion of the profits associated with southbound traffic.[33] The State of Alaska likewise opposed Alascom retaining

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Terminate Joint Service Arrangement, Continue NECA Participation, And For Limited Waiver Of Separations Rules And Resolution And Termination of Regulatory Proceedings, Attachment B at 4 (filed in CC Docket No. 83-1376 and RM 4436 by AT&T, Alascom, PTI, TUA on January 29, 1992).

[25] *E.g.*, AT&T currently estimates that its obligation under the agreement exceeds the revenues that it receives under the agreement by approximately $80 million. *Exparte* letter, A.L. Tyree, AT&T to William F. Caton, FCC, Acting Secretary, FCC (September 18, 1993).

[26] *Tentative Recommendation*, 8 FCC Rcd at 3687, para. 27.

[27] *Id.*

[28] Most parties in this proceeding either currently or historically have advocated termination of the JSA. *Tentative Recommendation*, 8 FCC Rcd at 3687.

[29] Comments of Alascom, CC Docket No. 83-1376 (April 13, 1989).

[30] Price cap regulation is described in *Policy and Rules Concerning Rates For Dominant Carriers*, 4 FCC Rcd 2873 (1989).

[31] A description of the ARC Plan may also be found in Comments of Alascom, Inc. (July 12, 1993) at Attachment 1.

[32] Reply Comments of AT&T (May 15, 1989) at 28; Reply Comments of GCI (May 15, 1989) at 16.

[33] Reply Comments of GCI (May 15, 1989) at 16.

any southbound traffic profits and expressed concern that service quality could suffer due to disincentives to invest and the lack of service quality monitoring under the ARC Plan.[34] As the ARC Plan did not resurface until Alascom filed its Comments on July 12, 1993, there have been no further comments on it in this proceeding.

3. Discussion

32. Alascom is the only party supporting the ARC Plan. The ARC Plan rests on continuing the JSA, and we are not persuaded that the decision to terminate the JSA should be abandoned. We have evaluated the JSA in light of our five objectives and find that the goals of enhancing competition in the Alaska market and increasing incentives for efficiency have not been furthered under the JSA. Indeed, the point of continuing this proceeding has been to devise a market structure that will permit the most balanced and complete achievement of our five objectives that is possible. Continuing the JSA even under the provisions of the ARC Plan simply will not allow that to occur.[35] Accordingly, we reject Alascom's latest proposal to resurrect the ARC Plan inasmuch as it fails to advance the objectives of this proceeding. Instead, we recommend moving forward with the adoption of the market structure proposed in the *Tentative Recommendation* as modified herein.

C. Consumer Benefit Plan

1. Introduction

33. AT&T filed a Petition on March 31, 1993, requesting the immediate termination of the JSA and adoption of its CBP proposal to allow for the entry of AT&T as a fully competitive interstate and intrastate toll provider in the Alaska market. Concurrently, AT&T filed an Application for Section 214(a) authority to create and operate a network for interstate service to and from Alaska.[36]

34. Under the CBP, AT&T would: (1) provide interstate MTS to and from Alaska at integrated rates; (2) eliminate its mileage bands 10 and 11, thus lowering rates for approximately 25% of the calls southbound from Alaska and 25% of the calls northbound to Alaska;[37] (3) offer Alaskan customers many of the AT&T services it claimed were not now available through Alascom; (4) build a new fiber optic submarine cable between Alaska and the Lower 48; and (5) enter into the intrastate MTS market in Alaska at rates equal to, or lower than, the lowest current rates of GCI or Alascom with a pledge not to raise those rates for five years, except to pass through any local exchange carrier ("LEC") access charge increases approved by the APUC.[38] AT&T conditioned its pledge to implement the CBP upon the occurrence of three events: (1) prompt termination of the JSA; (2) the granting of Section 214(a) authority; and (3) the issuance of an order directing Alascom to provide AT&T and other carriers with tariffed, cost-based services between their Alaskan points of presence ("POPs") and the networks of the Alaskan LECs.

2. Comments

35. In Alascom's Petition to Deny AT&T's Application[39] and in its Comments, Alascom asserted that the Application filed by AT&T was insufficient and contrary to the public interest.[40] Alascom stated that the CBP would duplicate facilities for no reasonable purpose and would result in an $80 million increase in cost without appreciably increasing revenues.[41] Alascom also contended that AT&T's arguments in support of the CBP were factually incorrect or contradicted by past filings.[42] Lastly, Alascom characterized AT&T's promise that, for a period of five years, it would charge intrastate rates that are lower than those of Alascom or GCI as "pricing without regard to cost" and destructive of the competitive marketplace.[43]

36. Other parties criticized the Application as lacking sufficient detail and key information necessary to analyze the plan.[44] ATU criticized the CBP as providing no assurance that it would not lead to increases in intrastate access rates.[45] The State of Alaska, while acknowledging the possibility that the CBP could be in the public interest on a theoretical basis, required more information "to determine whether AT&T's plan would result in a market structure that would make universal service achievable, rate integration sustainable, and jurisdictional cost shifts avoidable in both the short and long terms."[46] The CBP was also criticized by the State of Alaska as not providing an orderly transition to a new market structure and not adequately recognizing the investment that Alascom had made in reliance on the JSA.[47] The State of Alaska questioned how AT&T would provide service to rural areas of Alaska if Alascom's existing services were not available, given that AT&T does not currently have a satellite that serves those areas.[48]

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[34] State of Alaska Reply Comments (May 15, 1989) at 19-20.

[35] Alascom has not demonstrated that the ARC Plan is sufficiently different from the JSA to promote our competition and efficiency goals, especially given that, under the ARC Plan, Alascom continues to be guaranteed that AT&T would be a customer for virtually all of its interstate MTS.

[36] Application of AT&T (March 31, 1993), File No. W-P-C-6861.

[37] AT&T's Petition (March 31, 1993) at 6-7.

[38] AT&T stated that it would offer intrastate services at rates 4% lower than Alascom's standard rates. AT&T's Comments (June 28, 1993) at 23.

[39] Petition to Deny of Alascom, Inc. (June 25, 1993) FCC File No. W-P-C-6861.

[40] Comments of Alascom (July 12, 1993) at 18.

[41] Alascom Implementation Plan (June 7, 1993) at 29; Comments of Alascom (July 12, 1993) at 19.

[42] Comments of Alascom (July 12, 1993) at 23-26, 27-31.

[43] *Id.* at 34-35.

[44] For example, ATA maintained that AT&T's CBP and Section 214 Application failed to include "the details necessary to fully analyze the Plan's impact on Alaska's ratepayers and telecommunications market structure." ATA Comments (June 25, 1993) at 8. ATU contended that AT&T's CBP proposal was incomplete and that AT&T's associated request for Section 214 authority should be denied. ATU Petition to Defer or Deny (June 25, 1993) at 3. UUI asserted that there was insufficient detail to ensure that ratepayers were not saddled with duplicative and unnecessary facilities (UUI Comments (June 23, 1993) at 10) and that the CBP was not in the public interest (UUI Reply Comments (July 12, 1993) at 2).

[45] Comments of ATU (June 28, 1993) at 3.

[46] Comments of the State of Alaska (June 28, 1993) at 8-10.

[47] Reply Comments of the State of Alaska (July 12, 1993) at 4.

[48] State of Alaska Comments (June 28, 1993) at 10.

3. Discussion

37. AT&T asserts that its CBP "satisfies all of the Joint Board's previously stated objectives for an Alaska telecommunications structure" and that it will "benefit consumers more than any other plan offered during this proceeding."[49] On the surface, it does appear that AT&T is making a service commitment in the CBP that will continue integrated interstate MTS rates to Alaska (at even lower than current rates) and will introduce another competitor in the intrastate market at rates that are as low as, or lower than, those identified on the lowest currently available rate schedules, while at the same time bringing a wider array of services to Alaskans and newer, more reliable, technology to provide those services.

38. AT&T, however, has not provided sufficient information and data to permit us to find that AT&T's proposed CBP will satisfy the five objectives for a new market structure we have identified in this proceeding. In fact, no party of record, outside of AT&T, has stated that sufficiently detailed information exists to allow the Joint Board to adopt the CBP in its current form. Moreover, we are concerned that the plan does not contain any transition mechanisms or mechanisms to ensure that there will not be significant intrastate cost shifts when the JSA is terminated and AT&T provides service independently or to ensure that there will be no service disruptions or reductions in service quality while the market is reforming to adapt to the CBP structure. The CBP does nothing to enable Alascom to shift smoothly from the JSA to a new market structure, and during the transition to the new market structure it is essential that Alascom continue to provide service.

39. In conclusion, the CBP lacks sufficient detail to demonstrate that it satisfactorily achieves the five objectives of the Joint Board and fails to incorporate transition mechanisms essential to introduction of a new market structure in Alaska at this time. Thus, while there are attractive elements in the CBP, we cannot recommend its adoption. We do not believe that it is appropriate to further delay the resolution of this proceeding by calling for data to support the CBP's projection of future occurrences or by attempting to develop modifications to the CBP to ensure that it does not compromise our goals.

D. Recommended Market Structure

1. Introduction

40. As noted above, we have developed a revised Alaska market structure recommendation that is based on the *Tentative Recommendation* as modified by the results of our analysis of the comments, data, and concepts advanced by the parties. We believe that our recommendation reasonably balances the five objectives set forth in the *Supplemental Order*. In particular, the revised market structure we recommend is an improvement over the *Tentative Recommendation* in that it is simpler, provides greater assurance of revenue requirement neutrality, and at the same time produces a more rapid, yet controlled, transition to the new market structure. Therefore, we recommend that the Commission adopt our revised Alaska market structure plan. The following sections explain in detail the various aspects of our revised market structure recommendation, how it differs from the *Tentative Recommendation*, and why these changes and the overall arrangement serves the public interest.

2. Facilities Issues

a. Introduction

41. Under the market structure set forth in the *Tentative Recommendation*, Alascom and AT&T could each build or lease facilities individually in order to provide their services, subject, of course, to acquiring all necessary authorizations. The construction of facilities and provision of services by Alascom and AT&T would be governed by the same regulatory requirements applicable to dominant IXCs in the rest of the nation. The only exceptions are the current prohibition against construction of duplicate facilities in certain rural Alaska locations and the existing requirement that Alascom build facilities to allow provision of service to communities of 25 or more.[50]

b. Comments

42. Few comments were filed on this aspect of the *Tentative Recommendation* except in regard to lifting the current prohibition against construction of duplicate earth stations in rural Alaska.[51]

c. Discussion

43. We continue to support the position regarding facilities issues originally articulated in the *Tentative Recommendation*. No party strongly objects to that recommendation. No arguments have been raised to persuade us that a change in this facet of our recommended market structure is needed. Accordingly, we recommend, as we originally proposed, that AT&T and Alascom be free to build or lease their own facilities, subject to the requirements imposed generally outside Alaska on dominant IXCs and imposed on Alascom inside Alaska in the areas where Alascom has a facilities monopoly.[52]

3. Service Issues

a. Message Telephone Services/Wide Area Telecommunications Services

i. Introduction

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[49] AT&T's Petition to Terminate Joint Services Arrangement (March 31, 1993) at 6.

[50] In this *Final Recommended Decision*, we further clarify that in the case where no LEC facilities exist, Alascom may, on a case-by-case basis, be required to provide interconnection to locations that are functionally similar or equivalent to LEC end offices.

[51] This *Final Recommended Decision* does not address a lifting of that restriction.

[52] If a situation arose where customers in a community of 25 or more required interexchange service, but no facilities existed, Alascom would be required to build the facilities necessary to provide service or fully justify why such construction would not be in the public interest. The continuation under the *Tentative Recommendation* of this current obligation did not imply that Alascom was responsible for providing interstate MTS to those communities, but, rather, that it must make available and maintain the necessary facilities for IXCs desiring to provide MTS to gain access to customers in remote areas where duplicate facility construction is prohibited.

44. In the *Tentative Recommendation* we concluded that one or more carriers must be responsible for ensuring that interstate MTS is available at reasonable rates to all those requesting such service. We recommended that AT&T be responsible for providing Alaskan customers with interstate MTS at the same integrated rate levels and under the same terms and conditions available to other AT&T customers in the rest of the nation. This AT&T service requirement would apply to service between Alaska and the Lower 48 and between Alaska and Hawaii.

45. Under the *Tentative Recommendation* we also proposed that if Alascom chose not to provide interstate MTS under the new market structure, it must file under Section 214 of the Communications Act for authority to exit the market.[53] This filing also must include a plan for the smooth exit of Alascom from the MTS market to ensure that customers would not be faced with a service interruption.[54]

ii. Comments

46. AT&T stated that it had no authority to provide southbound interstate services and that the provision under the *Tentative Recommendation* to require AT&T to obtain Section 214 authority to provide such service was unenforceable.[55] In Reply Comments, GCI observed that the Commission has the clear authority to enforce AT&T's longstanding obligation to provide rate integrated service to the Alaska market. GCI maintained that whether AT&T chooses to comply with this responsibility by filing a Section 214 application to construct its own facilities to serve Alaska or chooses to use the facilities of other carriers is of no consequence. GCI also noted that Section 214(d) confers authority on the Commission to require a carrier to provide service to a particular locality or region. Thus, the operative legal standard is AT&T's pre-existing service responsibility to Alaska.[56]

iii. Discussion

47. We are not persuaded that we should significantly modify our position on MTS as identified in the *Tentative Recommendation*.

48. First, AT&T recognized and undertook the responsibility to provide both northbound and southbound interstate MTS at integrated rates to Alaska when it signed the JSA. If the southbound customers were not a responsibility of AT&T, then AT&T would not have signed a settlement agreement to arrange for their service nor would AT&T have agreed to cover all of the costs of those services.

49. Second, no party contends that AT&T does not have the obligation to provide rate integration both in Alaska and throughout the nation. AT&T's obligations under the Commission's rate integration policy apply regardless of the route of the call and the location of the caller; otherwise, the policy would be without effect. The Commission has adequate authority under Sections 201(a) and 4(i) of the Communications Act to enforce this policy,[57] without utilizing its authority under Section 214 of the Act[58] and, in fact, has already required AT&T to provide service to southbound Alaska customers under the rate integration policy and through approval of the JSA. We see no public interest reason to reduce or otherwise limit AT&T's rate integration obligation to serve the Alaska market and, therefore, continue to support the provision of interstate MTS outlined in the *Tentative Recommendation* and further discussed in this recommended decision.[59]

50. In light of the dissolution of the JSA as an integral part of the Alaska market structure, AT&T must continue to fulfill its pre-existing service obligation to Alaska. Any reduction in AT&T's obligation to serve could well leave Alaskans without service or without the benefits of rate integration. Such a situation would not be in the public interest and would be contrary to our previously identified goals. We accordingly recommend that the Commission explicitly recognize AT&T's obligation under Section 201(a) of the Communications Act to provide MTS service to and from Alaska on a nation-wide rate integrated basis.

51. We recommend that the Commission require AT&T to amend its Section 214 application consistent with the requirements of this order. We recommend that AT&T be given the flexibility under the recommended market structure to choose whether to lease facilities from another carrier or to build its own facilities, subject to the current prohibition against construction of duplicate facilities in rural Alaska. If AT&T chooses to build facilities, then it will be required to file a Section 214 application under standard procedures.[60]

52. Finally, we continue to recommend that, in order to prevent abandonment of service to Alaskan customers under the new market structure and for the reasons set forth in the *Tentative Recommendation*, Alascom must file a transition plan and file for permission under Section 214 of the Communications Act prior to exiting the MTS market, if it chooses to exit that market.

b. Alascom Common Carrier Services

i. Introduction

53. The *Tentative Recommendation* recommended that upon termination of the JSA Alascom provide to IXCs all interstate transport and switching services ("Common Carrier Services") needed to complete the long distance services of IXCs up to the Alascom point of interconnection

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[53] The *Tentative Recommendation* also proposed that Alascom not be allowed to exit the market as long as the JSA was in effect.

[54] In addition, Alascom would be allowed to sell its customer list subsequent to the termination of the JSA, provided customers were properly notified of any change in carrier and subject to approval of Section 214 authority to exit the market.

[55] AT&T Comments (June 28, 1993) at 10-13.

[56] GCI Reply Comments (July 12, 1993) at 2-4.

[57] In pertinent part, Section 201(a) states: "it shall be the duty of every common carrier ... in cases where the Commission . . . finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes." 47 U.S.C. § 201(a).

[58] 47 U.S.C. §214

[59] The public interest requires that AT&T continue to provide MTS at rate integrated levels to and from Alaska and between Alaska and Hawaii under the same terms, conditions, and rates as apply to provision of MTS elsewhere in the nation.

[60] AT&T must comply with all Section 214 requirements and has not requested any waiver of these provisions. AT&T would be required to make its facilities available to other carriers under tariff.

with each Alaskan local carrier.[61] It was proposed that Alascom's Common Carrier Services would be provided by tariff on a non-discriminatory basis, with rates averaged statewide. The requirement to average geographically Alascom's Common Carrier Service rates was intended to assure that the costs associated with serving areas of the state where facilities competition is permitted were not assigned to the rural areas of the state where Alascom has a facilities monopoly.[62]

ii. Comments

54. The commenters focused on the conclusion in the *Tentative Recommendation* that Alascom's Common Carrier Service rates should be averaged statewide. Both GCI and MCI supported this conclusion stating that deaveraging Common Carrier Service rates was unjustified and would allow Alascom to assign excessive costs to services provided in those areas of the state where it had a facilities monopoly.[63] The Commission's tariff review process alone, without rate averaging, was not deemed sufficient by these parties to protect against the potential abuses of cross-subsidization. GCI further argued that rate averaging would protect rural customers and would reduce incentives for IXCs to deaverage their end-user rates or restrict service on rural routes.

55. In contrast, Alascom, AT&T, the State of Alaska, and UUI all either opposed a requirement that the Common Carrier Service rates be averaged, or raised concerns. It was argued that geographic averaging of the rates would encourage AT&T to abandon Alascom's facilities.[64] Alascom contended that under this provision of the *Tentative Recommendation* GCI would gain a competitive advantage because it was not obligated to average geographically its switching and transport service rates or to serve the high-cost rural areas of the state.[65]

56. The State of Alaska also proposed the elimination of the geographic averaging requirement, claiming that costs of service were not equal statewide and imbalances between the average rates and the cost of service would likely lead to decreased traffic on the Alascom system, reduced efficiency, and upward pressure on intrastate rates.[66] It further argued that averaging was not needed since the tariffing process would ensure that rates were properly set. Sprint opposed statewide geographic rate averaging, claiming that such a policy was not justified.[67]

57. AT&T suggested that creating a separate study area for Alascom's services to Bush locations was preferable to statewide averaging of the Common Carrier Service rates.[68] The State of Alaska stated that the separate study area concept had merit, while UUI opposed the concept as unworkable, stating that it would be difficult for Alascom to generate sufficient revenues to support its network infrastructure.[69]

iii. Discussion

58. The provision of service in the Alaska market is unique. The satellite equipment necessary to provide communications to and from remote areas of the state has historically been high cost, and, as a consequence, there appears to be a large service cost disparity between the Bush and non-Bush areas of Alaska. For example, Alascom's intrastate dedicated transport rates for rural wholesale services are almost ten times higher than those for urban wholesale services.[70] Alascom has also claimed in this proceeding that its Bush costs are $.406 per minute while non-Bush costs are only $.106 per minute.[71] Alascom attributes the high cost per minute in Bush locations in part to the low traffic volumes associated with those locations.[72] Given the relationship between costs and traffic volumes (channels), it would be reasonable to assume that the low volume rural locations in Alaska would tend to have a higher cost of service than the high volume centers. After reviewing the record in this proceeding, we are persuaded that a significant disparity in the cost of service between the non-Bush and Bush areas of Alaska is highly likely.[73]

59. We further note that Alaska will be moving from a market structure where Alascom is isolated from the full effects of competition, since it had a guaranteed customer (AT&T), to a market where Alascom will become one of multiple carriers that will compete on essentially equally footing. For instance, Alascom's principal competitor to date, GCI, has built extensive facilities throughout large portions of Alaska and is well positioned to compete in the Alaska common carrier service market.

60. Given the expected high cost disparities within the Alaska market and the expected level of IXC competition, we must carefully evaluate whether Alascom's Common Carrier Service rates should be averaged statewide. With the exception of GCI and MCI, most commenters in this proceeding oppose statewide rate averaging for Alascom's

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[61] *Tentative Recommendation*, 8 FCC Rcd at 3688, para. 33.

[62] These areas are hereinafter referred to as non-Bush and Bush respectively. *See* Earth STations re Tentative Decision to Establish Joint Ownership, 92 FCC 2d 736 (1982); Policies Governing the Ownership of Domestic Satellite Earth Stations in the Bush Communities in Alaska, CC Docket 80-254, RM-3304, 96 FCC 2d 522, 541 (1984) at para. 40.

[63] GCI Comments (June 28, 1993) at 6; GCI Reply Comments (July 12, 1993) at 6-8; MCI Reply Comments (July 12, 1993) at 1-2.

[64] Alascom Implementation Plan (June 7, 1993) at 20; UUI Comments (June 23, 1993) at 4; AT&T Reply Comments (July 12, 1993) at 8; State of Alaska Comments (June 28, 1993) at 7; State of Alaska Reply Comments (July 12, 1993) at 3.

[65] Alascom Implementation Plan (June 7, 1993) at 21; Alascom Comments (July 12, 1993) at 15-17.

[66] State of Alaska Comments (June 28, 1993) at 7; State of Alaska Reply Comments (July 12, 1993) at 3.

[67] Sprint Comments (June 28, 1993) at 4-5.

[68] AT&T Comments (June 28, 1993) at 30.

[69] State of Alaska Reply Comments (July 12, 1993) at 3, n.1; UUI Reply Comments (July 12, 1993) at 5.

[70] Alascom's intrastate wholesale services are services purchased by carrier customers for resale. APUC Alascom Tariff No. 98, 1st Revised Page 368.

[71] Alascom Comments (July 12, 1993) at 50.

[72] *Id.* at 48-52.

[73] Our final recommendation includes a provision that Alascom file a Cost Allocation Plan ("CAP") with the Commission. We expect that the conclusions reached in this order regarding the cost disparity between non-Bush and Bush Common Carrier Services will be supported by the cost study that Alascom will be required to prepare. If after analysis, however, the cost study does not reflect that disparity, then the tariff for Alascom's Common Carrier services can be modified to reflect that fact.

Common Carrier Services. On balance, we are persuaded by the arguments of Alascom, AT&T, the State of Alaska, and UUI that a mandatory statewide averaged rate structure will require Alascom to price its services above cost in non-Bush areas and thus provide an artificial incentive for AT&T and other IXCs not to use Alascom's non-Bush network, even in cases where Alascom's underlying costs may be lower than those of its competitors. It is not our intent to handicap Alascom in the interexchange market. We are also concerned that our objective of revenue requirement neutrality will not be achieved if the Commission implements a mechanism (rate averaging) that most parties state would probably result in a shift in costs to the state jurisdiction as a result of lost interstate traffic.

61. We have also concluded that the advocates of statewide rate averaging have not demonstrated that deaveraging common carrier service rates will clearly lead to reduction in service availability or end use rate deaveraging. Our recommendation obligates the provision of interstate service statewide. Nor has the Commission given any indication that it would consider abandoning rate integration based on regional differences in the component costs of service. In conclusion, we are persuaded that allowing Alascom to file Common Carrier Service tariffs for two geographic rate zones will not lead to deaveraging of end user rates or to reducing the availability of service on facilities monopoly routes.[74]

62. While we remain concerned that the potential exists for Alascom to assign costs from its facilities competitive areas to its monopoly areas, we believe that potential cross-subsidization can be addressed without requiring statewide rate averaging. Accordingly, we recommend that Alascom be required to establish certain accounting safeguards to address the potential for cross subsidization. Those accounting safeguards should take the form of a CAP that would be filed with, and approved by, the Commission.

63. We believe that the *Computer III Remand Order* contains accounting safeguards that will serve as a useful starting point for the development of a CAP.[75] Recognizing that Alascom is a monopoly provider of service to the Bush areas of Alaska, its unique position raises the question of potential discrimination or cross subsidization. For this reason, the cost accounting requirement for Alascom is based on the cost accounting rules contained in the *Computer III* proceedings adapted to apply to Alascom's provision of service in the Bush areas. Alascom's submission must describe the accounting and cost allocation procedures that will be implemented to eliminate cross-subsidization.

64. The Alascom CAP shall be designed to segregate and identify separately, the costs, revenues, and investment for Alascom's monopoly Bush area operations, as distinct from those for its competitive, non-Bush operations. We recommend that the Commission require Alascom to divide its costs into three groups: those incurred solely to provide Bush service, those incurred solely to provide non-Bush service and those incurred to provide service to both the Bush and non-Bush areas.[76] The latter costs are referred to as joint and common costs. Further, we recommend that the Commission require Alascom to define its cost categories, to explain its procedures for assigning costs to these categories; and finally, for joint and common costs, to define its procedures for apportioning costs between the Bush and non-Bush areas. We recommend that the Commission closely examine Alascom's procedures for apportioning the operating lease expenses associated with the Aurora II satellite and Alascom's affiliated interest transactions.

65. We recommend that Alascom be required to file its CAP, including the categorization and allocation methodology described above, within three months of the release of a Commission Order adopting this recommendation.[77]

66. Given the above, we recommend that the provision in the *Tentative Recommendation* requiring that Alascom's Common Carrier Service rates be averaged statewide be eliminated. We conclude instead that division of Alascom's operations into two major geographic rate zone cost categories as defined through a CAP be adopted: (1) to accommodate the concern that Alascom could assign excessive costs to its Bush services, and (2) to recognize the apparent difference in costs within Alascom's network between its Bush and non-Bush geographic rate zones. The proper development of the rates within these two cost categories would be a matter for the Commission tariff review process.

67. We have not recommended a separate study area approach, as suggested by AT&T, for a variety of reasons. First, study areas are generally "self-contained" in that the predominant equipment necessary to provide the utility's service to the study area is located in its entirety within the study area and not split between study areas. By comparison, AT&T's proposal would divide the equipment (e.g., satellite, earth stations, buildings) necessary for the provisioning of Alascom's service, between the study areas that have been proposed. This is not a typical application of the study area concept, would prove controversial, and could set a precedent regarding division of study areas that is beyond the scope of this Joint Board. Second, a study area approach has the potential to affect the intrastate jurisdiction, which could lead to further controversy that could prevent the speedy resolution of this proceeding without effectively adding any benefit.[78]

68. In summary, we recommend that there be two geographic rate zones under Alascom's Common Carrier Service tariff: one zone for services associated with locations where facilities competition is allowed and another zone

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[74] Geographic rate zones should be viewed as the creation of different pricing schedules either by geographic region or group of locations. In this order we will generally refer to geographic rate zones as the difference in rate schedules for services associated with locations where Alascom holds a facilities monopoly (Bush) and services for all other locations (non-Bush).

[75] *See* Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, CC Docket No. 90-623, 6 FCC Rcd 7571 (1991) (*Computer III Remand Order*), *pets. for recon. pending, pets. for rev. pending*, California v. FCC, No. 92-70083 (9th Cir. filed Feb. 14, 1992).

[76] Bush services are defined as those interstate services that either originate or terminate in the Bush.

[77] We recommend that Alascom's CAP proposal be subject to notice and comment.

[78] We would not be prepared to recommend any change in Alaska's study areas without consulting with the APUC in conformance with the Commission's standard practice when study area changes are contemplated.

for services involving the locations where a facilities monopoly is prescribed. To accommodate concerns that costs will be properly allocated to the monopoly operations, Alascom should be required to file a CAP to appropriately assign costs between these two geographic rate zones. Issues arising with regard to Alascom's Common Carrier Services tariff would be resolved in accordance with the requirements of the Communications Act.

c. Private Line Services

i. Introduction

69. As proposed in the *Tentative Recommendation*, Alascom would be required to provide interstate private line services statewide, and if AT&T chooses to provide interstate private line services in Alaska, it must do so under Section 214 authority and make available its services statewide to the same extent as comparable AT&T private line services are available throughout the nation.

ii. Comments

70. AT&T rejects the notion that it could be compelled to obtain Section 214 authority to provide southbound interstate services although that is what it has proposed to do voluntarily under its CBP.[79] AT&T also states that while it would provide private line services pursuant to the Communications Act, it could not be assumed that its terms, conditions, and service area for private line services would be the same as that for MTS.[80] Alascom implies that it should not be required to provide private line service and instead proposes that it provide "private line links" similar to special access.[81]

iii. Discussion

71. In this order we reaffirm the provisions of the *Tentative Recommendation* with respect to private line services. While we recognize Alascom is currently providing interstate private line service as a dominant carrier, we believe it is necessary for the market structure adopted by the Commission to be explicit in this matter to ensure uninterrupted and universal service in Alaska. Alascom must continue to provide statewide interstate private line service. It would appear neither practical nor reasonable for Alascom to function solely as a "special access" provider in the market and to abandon its private line service at this time. Otherwise, Alascom's private line customers would likely be stranded without service since Alascom has not identified which carrier, if any, would take over its responsibility in the private line market.

72. With respect to AT&T's private line services, we recommend that if AT&T chooses to provide interstate private line service to and from Alaska, it be required to do so under the same rate structures, terms, and conditions attendant to its provision of private line services among the Lower 48 states.[82]

d. Dominant Carriers

73. The *Tentative Recommendation* proposed that both Alascom and AT&T retain their status as dominant carriers while the JSA existed. Upon JSA termination, AT&T would be considered dominant for the provision of both northbound and southbound MTS services. Additionally, AT&T would be considered dominant in the provision of service in the Alaska-Hawaii market. We proposed that in the post-JSA market, Alascom would initially continue to be considered dominant for its provision of MTS, private line, and Alascom Common Carrier Services, with the provison that Alascom's status could be reviewed after the recommended transition period. Alascom's dominant status was based upon its primary control over the Alaska Spur, its statewide network, and its service and facilities monopolies in those areas where duplicate earth station construction is prohibited.[83]

i. AT&T's Dominant Status

1) Comments

74. AT&T challenged the proposal that it be designated as a dominant carrier for southbound Alaska MTS service.[84] Sprint's Reply Comments supported AT&T's dominant carrier status for provision of Alaska service. Sprint stated that the Commission has taken the position that there is a single national relevant geographic market (including Alaska, Hawaii, Puerto Rico, U.S. Virgin Islands, and other U.S. offshore points) for AT&T's interstate domestic, interexchange telecommunications service with no relevant submarkets. Although in the past the Commission has indicated that it might consider different markets for AT&T, Sprint argues that in later cases it has declined to do so. Sprint further observed that the record was insufficiently developed to warrant the treatment of Alaska as a separate geographic market or submarket for determining AT&T's market power. Hawaii also pointed out in Reply Comments that customer perception, the factor cited by AT&T to support its contention that it is non-dominant in the Alaska southbound market, is just one feature to consider when determining market dominance: the number and size distribution of competing firms, the nature of barriers to significant entry (including control of significant facilities), and the availability of reasonably substitutable services must also be evaluated.[85]

2) Discussion

75. After considering the parties' comments, we find that the record is insufficient to justify that Alaska be deemed a separate relevant AT&T geographic market or submarket, nor would treatment of Alaska as a submarket be consistent with the Commission's rate integration policy. Since AT&T is classified as a dominant carrier for its provision of

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[79] AT&T's Comments (June 28, 1993) at 11; AT&T Application (March 31, 1993) at 3.

[80] AT&T's Comments (June 28, 1993) at 10.

[81] Alascom Implementation Plan (June 7, 1993) at 26.

[82] Hawaii maintains that rate integration applies to all telecommunications services, particularly MTS and private line service. Hawaii has also asked that the Commission clarify that rate integration applies to service between the contiguous states and Hawaii or Alaska and between Hawaii and Alaska. Hawaii Comments (June 28, 1993) at 20. We have specifically declined to address the issue of rate integration pertaining beyond the Alaska MTS market because the issue of rate integration applying to other interstate services is beyond the scope of this proceeding.

[83] *Tentative Recommendation*, CC Docket No. 83-1376, 8 FCC Rcd at 3689, para. 39.

[84] AT&T Comments (June 28, 1993) at 10-14.

[85] Hawaii Reply Comments (July 12, 1993) at 2-3.

MTS in the Lower 48, this classification should be equally applicable to AT&T's provision of MTS to and from Alaska and between Alaska and Hawaii.

ii. Alascom's Dominant Status

76. No party, including Alascom, filed comments in response to the conclusions in the *Tentative Recommendation* regarding this issue. We continue to believe that Alascom should be classified as a dominant carrier.

4. Circuit Equipment Allocation Factor/Alaska Fund

a. Introduction

77. In the *Tentative Recommendation* we proposed to reduce the frozen allocation factor for Alascom circuit equipment from 86% to 75%. This change was recommended for several reasons, including enhanced interstate and intrastate competition as well as more accurate recognition of the character of Alascom's costs. In addition, the same separations factor would be applied to UUI's one-half interest in the earth stations owned and operated by Alascom.

78. The allocator proposed under the *Tentative Recommendation* would be implemented January 1, 1994, but the shift in circuit equipment costs from the interstate to the intrastate jurisdiction would be phased in over 10-years. The difference between the 75% factor and the factor in effect during each year of the phase-in would be paid from a special Alaska Fund. The Alaska Fund would be administered by NECA, which would file a tariff to collect the requisite funds from all interexchange carriers that contribute to the Universal Service Fund and would make payments from the Alaska Fund to Alascom and UUI. At the end of 10 years, the Alaska Fund would be terminated and the 75% interstate allocator would be fully in effect. We tentatively concluded that, in the context of the overall transition plan, 25% of Alascom's circuit equipment costs, but no more than 25%, could be assigned to the intrastate jurisdiction without causing an undue increase in intrastate rates. However, we specifically invited comments on this point.

b. Comments

79. In the Implementation Plan filed on June 7, 1993, Alascom presented financial data and commentary regarding the impact of the *Tentative Recommendation* on the Joint Board's goal of revenue requirement neutrality. Alascom assumed that the 75% circuit equipment allocation factor would be in effect at the end of the 10-year transition period and analyzed the impact of varying levels of accelerated cost recovery ("ACR") on intrastate rates. Based on its 1992 year-end financial statements and several assumptions,[86] Alascom estimated that with ACR of $150 million paid over three years, there was a net increase in annual intrastate operating expenses of $23 million or 71% from 1993 to 2000 due to the change in the circuit equipment allocator. Alascom estimated that the intrastate revenue requirement shortfall would be $19 million or $.0609 per minute in the year 2000.[87] Performing the same analysis using ACR of $221 million paid over three years, Alascom contended that there would be a $13.8 million revenue requirement shortfall in the year 2000.[88]

80. Alascom argued that revenue requirement neutrality could not be assured simply by reducing plant; rather, it would be necessary to reduce expenses.[89] Alascom also stated that "any significant cost reduction must be sought from the labor force, the only material, residual cost category remaining."[90] Alascom stated that its ACR analyses already included a 10% reduction in the work force. However, Alascom stated that an additional 23% cut in positions would be required to meet the $4 million intrastate revenue requirement shortfall projected for 1993 under the $221 million ACR assumption.[91] Alascom argued that the labor cuts necessary to achieve revenue requirement neutrality were unrealistic and, in any event, would severely harm its ability to deliver service. Alascom further asserted that technological change alone would not be adequate to address the issue of Alaska's high service costs.

81. In its July 12, 1993 Comments, Alascom proposed increasing ACR by a prepaid expense of $72 million, which it described as a "Transitional Credit Facility" or "TCF". Alascom stated that the TCF was designed to moderate AT&T's abandonment of the Alascom network and any intrastate cost shifts that would result. The TCF would be amortized over a four-year transition period after termination of the JSA: the more AT&T used Alascom to carry traffic, the more of the TCF AT&T would recover. Using the same underlying financial data it relied on for its Implementation Plan, Alascom argued that a $221 million ACR plus a $72 million TCF would result in an intrastate rate decrease of 3% in 1997 and thereafter. [92]

82. Alascom filed Reply Comments on July 22, 1993, in which it maintained that AT&T did not care about intrastate cost increases because it would not base its prices on costs. Alascom stated that AT&T's data demonstrated that its intrastate costs would exceed revenues every year, which raised concerns about predatory, anticompetitive behavior.[93]

83. AT&T's June 7, 1993 Response did not address the change in circuit equipment allocation factor. However, in its June 28, 1993, Comments AT&T stated that on the basis of Alascom's figures, implementing the *Tentative Recommendation* was likely to lead to increases in Alascom's intrastate revenue requirements in both the short and long term.[94] AT&T then suggested that revenue requirements and by implication, revenue requirement neutrality were not the appropriate standard in a competitive environment.[95] While endorsing the rationale in the *Tenta-*

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[86] The major assumptions are listed on pages 11 and 12 of Alascom's Implementation Plan (June 7, 1993).

[87] *Id.* at 13-14, Exhibit H.

[88] *Id.* Exhibit J.

[89] "Reliance solely upon an ACR program cannot achieve the revenue requirement neutrality goals established in 1989 by the Joint Board and reaffirmed in the Tentative Recommendation. This is part of the intractability' of the Alaska service problem. Therefore, to the extent the problem cannot be solved by addressing the plant part of the equation, the expense side of the issue must come into question." *Id.* at 16.

[90] *Id.* at 16-17.

[91] *Id.*

[92] Comments of Alascom (July 12, 1993) at 12-14.

[93] Alascom Reply Comments (July 22, 1993) at 7-8.

[94] AT&T Comments (June 28, 1993) at 17.

[95] *Id.* at 19.

tive Recommendation for changing the existing allocation factor, AT&T stated that the issue of separations changes would be irrelevant under the CBP.[96] Finally, AT&T was critical of the complex transition mechanisms proposed in the *Tentative Recommendation*, including the establishment of the Alaska Fund.

84. AT&T's July 12, 1993 Reply Comments stated that the *Tentative Recommendation* failed to provide reasonable assurance that intrastate rates would not be increased with the introduction of a competitive market structure.[97] AT&T reiterated its position that, while the existing allocator is inappropriate and unfair, no change was necessary under the CBP; and, without a change in the separations factor, no Alaska Fund was required.[98] AT&T concurred in changing the frozen allocator if the *Tentative Recommendation* were adopted and, therefore, opposed the State of Alaska's suggestion that ACR be dedicated totally to interstate plant because that would negate the use of ACR to offset jurisdictional cost shifts.[99] AT&T maintained that, ultimately, the forces of competition could be relied on to keep intrastate rates at or below their current levels. In response to Alascom's claims of possible predation, AT&T projected that, under the CBP, its intrastate revenues would exceed intrastate revenue requirements for the period 1999 - 2003.[100]

85. The State of Alaska's June 28, 1993 Comments raised concerns regarding the extent of the jurisdictional cost shift created by the change in allocation factor proposed in the *Tentative Recommendation*. Based on the size of the Alaska Fund in years 1994 - 1997 and other anticipated increases in intrastate cost allocations, the State of Alaska estimated that intrastate costs would increase by more than $10 million or $40 per year per access line.[101] The State of Alaska suggested that the intended purpose of the change in allocation factor, *i.e.* reducing Alascom's interstate costs, could be accomplished instead by targeting the ACR to interstate plant. In addition, according to the State of Alaska, retention of the existing separations factor would negate the necessity for an Alaska Fund and would be more consistent with policies and procedures for achieving rate integration and universal service in the rest of the country.[102]

86. In its June 23, 1993 Comments, UUI endorsed the use of a frozen allocator for separating circuit equipment costs and the consistent application of this factor regardless of ownership of the facilities.[103] UUI also recommended that the Alaska Fund be administered on the same basis as state access charges (*i.e.*, no "true-up") rather than on the basis of other NECA funds.[104] UUI's July 12, 1993 Reply Comments challenged AT&T to state clearly its position on the use of a frozen allocator and what separations factor it is endorsing for Alaska.[105]

87. In other comments filed, ATA generally supported the phased-in change in allocation factor.[106] ATU expressed concern with the potential impact of the *Tentative Recommendation* on access costs and rates and local rates of LECs based on changes in demand resulting from increased intrastate interexchange rates.[107] USTA did not object to the phasing down of the separations factor for Alascom and UUI but suggested that the full impact of any resultant increase in local rates needed to be considered so as not to jeopardize universal service.[108] MCI opposed requiring all interexchange carriers to contribute to the Alaska Fund.[109] Sprint questioned the need for the Alaska Fund and why such costs could not be recovered from the intrastate jurisdiction rather than from interstate interexchange carriers that do not use Alascom's services.[110] In its reply comments Sprint reiterated its objection to the Alaska Fund generally and expressed its opposition to AT&T's suggestion that contributions to such a fund be based on minutes of use.[111] NECA expressed its willingness and ability to administer an Alaska Fund, if it were created, and offered suggestions regarding the structure of the fund and the provision of data to NECA.[112]

c. Discussion

88. We initially proposed a reduction in the interstate circuit equipment allocator in conjunction with an overall plan for a transition to a more competitive environment, with the expectation that this plan would enhance the development of competition in Alaska with minimal intrastate cost shifts at the conclusion of a 10-year phase-in period. Based on the comments in response to this proposal, we are changing significant aspects of the proposed overall plan for achieving our five objectives in this proceeding. With these modifications, which include the termination of the JSA after one and one-half years and the shortening of the subsequent transition period to two and one-half years, we conclude that the change in cost separations factor set forth in the *Tentative Recommendation* is neither necessary nor desirable as a transition mechanism for the new market structure.

89. The cost analysis presented by parties have persuaded us that the change in cost separations factor set forth in the *Tentative Recommendation* would violate the revenue requirement neutrality objective we established in the *Supplemental Order*, and therefore, the 86% interstate allocator should be retained for Alascom's equipment.

90. The retention of the current separations factor would significantly simplify the transition. There would be no need for the Alaska Fund, eliminating both the need to resolve the issues raised with respect to its policy premises and operation and the administrative costs of establishing and operating this separate fund for a limited time period.

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96 *Id.* at 22.
97 AT&T Reply Comments (July 12, 1993) at 3.
98 *Id.* at 5.
99 *Id.* at 6.
100 *Id.* at 7.
101 State of Alaska Comments (June 28, 1993) at 4-5.
102 In Reply Comments, dated July 12, 1993, the State of Alaska reiterated its position that the *Tentative Recommendation* should be modified to retain the existing circuit equipment allocator in order to avoid intrastate cost shifts and rate increases.
103 UUI Comments (June 23, 1993) at 2-3.
104 *Id.* at 3.
105 Reply Comments of UUI (July 12, 1993) at 3-4.
106 ATA Comments (June 24, 1993) at 4.
107 ATU Comments (June 28, 1993) at 1-2.
108 Reply Comments of USTA (July 12, 1993) at 2-3.
109 MCI Comments (June 28, 1993) at 1.
110 Comments of Sprint (June 28, 1993) at 3-4.
111 Reply Comments of Sprint (July 12, 1993) at 2.
112 NECA Comments (June 28, 1993) at 1-4.

91. Another reason for reaffirming the current frozen allocation factor is recognition that the market structure contemplated under this order eventually will reduce the importance of cost separations rules on rates for services. The price cap regime which currently governs AT&T's interstate rates reinforces this supposition. We believe that the revised transition time frames we recommend are sufficiently short to make it on the one hand, unnecessary to consider a change in the allocation factor at this time and, on the other hand, necessary to provide the intrastate ratepayers with adequate assurance against more rapid, unforeseen revenue requirement shifts that may occur.

92. In addition, we recognize that the factor at issue applies both to AT&T and Alascom and that it may be preferable for any modifications to the factor to be based on broader considerations than were contemplated in this proceeding. While the current mileage-based factor may not be applicable for all components of circuit equipment, it was approved by another joint board and is presumptively appropriate until modified.

93. Accordingly, we recommend that the frozen 86% interstate allocator be retained for Alascom's and UUI's circuit equipment.[113]

V. Transition Mechanisms

94. A number of transition mechanisms will be required as a condition of adoption and successful implementation of the market structure which is recommended in this order. We believe that the Commission can modify the *status quo* and place conditions on JSA termination to achieve the five objectives and the public interest under Sections 1, 4(i)-(j), 201, and 202 of the Communications Act.[114] Consequently, the Commission has the authority to require implementation of the transition mechanisms that we recommend in this section, even after the JSA is terminated.

A. Transition Periods For JSA Termination and AT&T's Use of Alascom Facilities

1. Introduction

95. Under the *Tentative Recommendation* we proposed that the JSA be eliminated after three years. This transition period was chosen to allow for Alascom's adjustment to the competitive conditions under the market structure, to develop and to approve the required Alascom tariffs, and to implement certain transition mechanisms.

96. The *Tentative Recommendation* further proposed that, after the JSA was eliminated, AT&T would be required to purchase Common Carrier Services from Alascom for four years. Under the *Tentative Recommendation*, AT&T's purchase obligation would be reduced in equal annual increments until it was zero at the end of the fourth year.[115] As proposed, those increments would be based on a percentage of AT&T's MTS traffic carried by Alascom during the last year of the JSA. The *Tentative Recommendation* stated that the purchase requirement was necessary to reduce the potential for unforseen jurisdictional revenue requirement shifts if AT&T immediately stopped using Alascom's facilities.

2. Comments

97. Alascom contended that the JSA should not be eliminated, but that if termination were required, that termination should occur no sooner than the timetable set forth in the *Tentative Recommendation*.[116] Alascom argued that the JSA was lawful, that it had successfully achieved universal service, and that it did not harm competition.[117] Alascom stated that allowing AT&T into the market would lead to harmful effects.[118]

98. ATA stated that delaying AT&T's ability to build its own facilities in Alaska would reduce AT&T's incentives to invest in the Alaska market.[119] ATA also stated that the *Tentative Recommendation* eliminated Alascom's incentive to upgrade its equipment or to prepare for replacement of the Aurora II satellite, whose estimated life would terminate in 2001.[120]

99. Similarly, AT&T stated that continuing the JSA until 1997 would force it to delay entering the market at which time AT&T might no longer have an economic incentive to construct the network proposed under the CBP.[121] AT&T further argued that parties supporting the *Tentative Recommendation* would benefit from the delay created under that plan.[122] With regard to the *Tentative Recommendation* 's transition mechanisms, AT&T stated that there was no legal basis for requiring it to purchase services from Alascom after the JSA was terminated.[123]

100. GCI supported termination of the JSA and stated that the *Tentative Recommendation* provided a workable compromise for the JSA's replacement that should be implemented no later than the beginning of 1994. [124]

101. The State of Alaska argued that the transition timetable set forth in the *Tentative Recommendation* did not promote quick delivery of new and improved services to Alaska.[125] The State of Alaska's recommended solution to this perceived shortcoming was to reduce the period that AT&T must place traffic on the Alascom network from four to two years.[126] The State of Alaska did not propose any change in the three years that were proposed for retention of the JSA.

102. UUI stated that the JSA should remain in effect until AT&T presents an adequate implementation plan for the ACR issue it was requested to address in the *Tentative Recommendation*.[127] UUI indicated that the transition time

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[113] Since the circuit equipment allocation factor proposed for UUI mirrored that for Alascom, it also will remain at the 86% interstate level.

[114] 47 U.S.C. §§ 151, 154(i)-(j), 201, 202.

[115] The *Tentative Recommendation* also allowed Alascom and AT&T to propose an alternative schedule for reduction of AT&T's purchase obligation, subject to the Commission's approval. *Tentative Recommendation*, 8 FCC Rcd at 3696, para. 84.

[116] Alascom Implementation Plan (June 7, 1993) at 23.

[117] Comments of Alascom (July 12, 1993) at 42-55.

[118] *Id.* at 44.

[119] ATA Comments (June 25, 1993) at 5.

[120] *Id.* at 5-6.

[121] AT&T Comments (June 28, 1993) at 26.

[122] AT&T Reply Comments (July 12, 1993) at 2.

[123] AT&T Comments (June 28, 1993) at 20.

[124] GCI Comments (June 28, 1993) at 1-2.

[125] State of Alaska Reply Comments (July 12, 1993) at 2-3.

[126] *Id.* at 3.

[127] UUI Reply Comments (July 12, 1993) at 3.

under the *Tentative Recommendation* appeared adequate but continued to question Alascom's viability as a transport carrier if AT&T were allowed to construct its own facilities in Alaska.[128]

3. Discussion

103. Based on the comments filed, and in light of the other changes recommended in this order, we have reconsidered the schedule proposed for termination of the JSA and for AT&T's obligation to purchase services from Alascom . We now recommend that both of these transition mechanisms should be shorter in duration than originally proposed.[129]

104. The comments present strong reasons to believe that, overall, the transition timetable under the *Tentative Recommendation* is too long. First, concerns have been raised by parties, including the State of Alaska, that a long transition period disadvantages Alaskans because it discourages carriers from investing in new technologies and new equipment and from entering this market. No party has suggested that these concerns regarding investment and entry are immaterial or inconsequential.[130]

105. Second, several parties have noted that the useful life of the Aurora II satellite is expected to end by 2001 and that significant lead time is required for planning and launching its successor.[131] It is critical for universal service that a satellite be available to provide transport services to remote rural Alaskan locations. We conclude that, to the extent reasonably possible, our transition mechanisms should be shortened so as not to interfere with the orderly replacement of Aurora II capacity. A shorter transition should reduce uncertainties as to service requirements applicable to this market and as to the financial issues involved. Third, AT&T states that it may be at a competitive disadvantage in the future if it is not now given the freedom enjoyed by its competitors to build facilities as necessary in Alaska. Surveys conducted by AT&T also suggest that Alaskans would welcome the opportunity for AT&T to enter the market.[132]

106. Last, we believe that other changes in our proposed market structure adequately address the concerns underlying Alascom's opposition to any shortening of our proposed transition. That opposition reflected Alascom's view that our originally proposed transition period was the minimum period required for it to adapt to the proposed market structure because of the substantial revenue requirement shifts to the intrastate jurisdiction that it projected. As explained *supra*, this final recommendation retains the existing cost separations factor for Alascom's circuit equipment. This modification in conjunction with our other recommendations significantly reduces, if not eliminates, the intrastate cost shift that Alascom could have experienced under the *Tentative Recommendation*.[133] Because of this and because retention of the frozen separations allocator simplifies the transition, this final recommendation also substantially decreases the uncertainty associated with the transition. In sum, without a change in the separations factor, the differences between the *status quo* and the new market structure are reduced. This, in turn, permits a shortening of the transition mechanisms previously proposed.

107. We have thus concluded that the transition to the new market structure can and should be completed by March 1, 1998. We recommend that the implementation of the revised market structure should begin March 1, 1994. This would allow four years for the transition from the *status quo* to a fully competitive market structure. We affirm our proposal in the *Tentative Recommendation* that there should be two phases to the transition, a phase during which the JSA would be in effect and a phase after termination of the JSA during which AT&T would be obligated to purchase declining levels of Alascom's Common Carrier Services under tariff. We also recommend that the duration of each of these phases should be one and one-half years for continuation of the JSA and a period of two and one-half years for the phase down of AT&T's obligation to purchase Alascom's Common Carrier Services under tariff.[134] The second time period is consistent with the recommendation of the State of Alaska, which proposed that AT&T's "must purchase" obligation should be reduced from four to two years and that our entire proposal is consistent with the idea that the majority of key market changes occur so as not to interfere with the satellite replacement. At the Telecommunications Task Force hearing conducted on August 27, 1993 (*see* para. 23, *supra*), GCI and MCI stated that reduction in the timeframe, as proposed by the State of Alaska, would be acceptable, and AT&T generally supported a shorter transition period.

B. Transition Payments, Accounting Issues, and AT&T's Use of Alascom Facilities

1. Introduction

108. Under the *Tentative Recommendation* we concluded that it was necessary to reduce Alascom's costs through an ACR mechanism to ameliorate potential cost shifts to the intrastate jurisdiction and to allow Alascom to better adapt

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[128] UUI Comments (June 23, 1993) at 4.

[129] This recommendation assumes that all major aspects of this recommendation will be placed in effect. Our recommendation incorporates provisions that are designed to balance many factors; the elimination of any of these provisions would upset that carefully crafted balance.

[130] At hearings held before an Alaska Telecommunications Task Force on August 27, 1993, Alascom and the State of Alaska stated separately that uncertainties in the Alaska market structure would inhibit investment in that market.

[131] In particular, UUI has indicated that it takes approximately four years to negotiate an RFP and to build and launch a replacement satellite. UUI further stated that in order to assure adequate satellite coverage of Alaska, by 1997 "someone will need to step forward to spend approximately $100 million to replace Aurora II." UUI Comments (June 28, 1993) at 8.

[132] AT&T Supplemental Reply Comments (July 12, 1993) at Exhibit A. There are also letters from members of the public filed in the record of this proceeding that oppose AT&T's entry primarily because of concerns about degradation in universal service and service quality. We believe that our recommendation mitigates these concerns by imposing service requirements on AT&T and Alascom.

[133] The change in separations factor in conjunction with our other changes proposed under the *Tentative Recommendation* was one of the key motivating factors that led us to recommend the seven and ten year transition periods.

[134] AT&T's comments regarding the legal basis to establish transition mechanisms are addressed in *supra* paras. 49-50, 94 and *infra* paras. 122-127.

to the new market structure. We were concerned that cost shifts could occur as a result of our proposed change to the separations factor for circuit equipment and as a result of possible AT&T reduction in use of the Alascom network. The *Tentative Recommendation* did not identify the exact form of ACR that was to be adopted and, instead, requested Alascom and AT&T to file implementation plans to suggest an appropriate mechanism. One option suggested under the *Tentative Recommendation* was that the ACR be provided through accelerated depreciation of assets funded by lump sum payments made by AT&T to Alascom.

2. Comments

a. Accelerated Cost Recovery

109. Alascom generally supported the ACR mechanism proposed in the *Tentative Recommendation*. Alascom expressed concern, however, that the amount paid be sufficient to achieve the Joint Board's goals, particularly jurisdictional revenue requirement neutrality.[135] Alascom stated that a total ACR payment of $150 million was too low and that the figure should be $221 million with an additional TCF payment of $72 million to offset operating expenses.[136] Alascom argued that significant jurisdictional cost shifts would occur absent adequate ACR payments.[137]

110. In its response to the Joint Board's request for implementation plans, AT&T failed to present a proposed ACR mechanism; rather, it objected to the entire concept for several reasons. First, AT&T characterized ACR as an inefficient way to reduce Alascom's costs inasmuch as Alascom's costs were perceived to be driven primarily by its high operating expenses. Second, AT&T believed it would not recoup as much as it would pay under the ACR mechanism.[138] Third, AT&T objected to having the responsibility to fund cost reductions for its competitor.[139] Fourth, AT&T argued that the Commission has no legal authority to compel AT&T to enter into a voluntary agreement under which it would bear sole responsibility for this obligation to Alascom.[140] Fifth, AT&T questioned the need for an ACR, stating that Alascom had not demonstrated that it could not function profitably in a competitive market without subsidy.[141]

111. ATA concurred with AT&T that the key to achieving revenue requirement neutrality under the *Tentative Recommendation* would be reducing what it believed to be Alascom's high operating costs.[142] ATA also raised the concern that the ACR proposal would be ineffective if Alascom were to continue to install plant during the transition period.[143]

112. The other parties that filed comments in response to the *Tentative Recommendation* were nearly unanimous in their endorsement of some form of ACR for Alascom.[144]

b. Application of Payment

113. AT&T proposed that any plant write-down under an ACR mechanism be limited to plant employed to provide services to other carriers.[145] Alascom stated that the ACR should be applied as broadly as possible.[146] GCI and the State of Alaska contended that any ACR-funded plant write-down should apply only to interstate MTS plant.[147] They raised concerns regarding potential litigation and the dilution of the effects of the ACR if it were applied to the entire Alascom rate base as opposed to just the interstate portion. AT&T stated that it would be inappropriate to apply ACR payments solely to Alascom's interstate plant; to do so would limit the effectiveness of the ACR in meeting its purposes of offsetting the jurisdictional cost shifts and minimizing the upward pressures on intrastate rates that would result from the separations change proposed under the *Tentative Recommendation*.[148] GCI also suggested that for each year of the transition, Alascom should file a proposed accounting treatment for any write-down with the Commission's Common Carrier Bureau. UUI recommended that the JSA remain in place until AT&T adequately addressed the ACR problem.[149]

3. Discussion

a. Transition Payment

i. Legal Issues

114. AT&T has argued that the Commission does not have the legal authority to force it into a voluntary agreement nor can the Commission compel AT&T alone to make the transition payment.[150] We have concluded that neither argument prevents the Commission from requiring a transition payment as a condition for implementing a new market structure that achieves the proper balancing of Joint Board objectives that are derived directly from the Communications Act. We also note that this accomplishes AT&T's long sought-after goal of terminating the JSA, under which it estimates that it loses $80 million per year.

115. We conclude that a payment is essential to a successful transition to a post-JSA Alaska market structure, in particular to prevent a reduction, or impairment, in universal service during the transition from the unique market structure under the JSA to a more open competitive market structure comparable to that prevailing in the Lower

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[135] Alascom had previously opposed any form of ACR, but in its recent comments it has stated that such a mechanism was essential. Alascom Implementation Plan (June 7, 1993), *passim*.

[136] Alascom Implementation Plan (June 7, 1993) at 9-16, Exh. H; Alascom Comments (July 12, 1993) at 8-15.

[137] Alascom Comments (July 12, 1993) at 8.

[138] AT&T stated: "on a net present value basis, AT&T would not recoup through lower Alascom charges about 14 cents for each dollar paid to reduce Alascom's asset base." AT&T Implementation Plan (June 7, 1993) at 4.

[139] AT&T Implementation Plan (June 7, 1993) at 3-6.

[140] AT&T Comments (June 28, 1993) at 20.

[141] *Id.* at 18-19.

[142] ATA Comments (June 25, 1993) at 6.

[143] ATA testimony, Telecommunications Task Force Hearing (August 27, 1993).

[144] UUI Comments (June 23, 1993) at 2; Comments of GCI (June 28, 1993) at 4; Comments of the State of Alaska (June 28, 1993) at 4; Comments of SWBT (June 28, 1993) at 4.

[145] AT&T Implementation Plan (June 7, 1993) at 5.

[146] Alascom Implementation Plan (June 7, 1993) at 37.

[147] GCI Comments (June 28, 1993) at 5; State of Alaska Comments, (June 28, 1993) at 5.

[148] AT&T Reply Comments (July 12, 1993) at 6.

[149] UUI Reply Comments (July 12, 1993) at 2.

[150] AT&T Comments (June 28, 1993) at 19-20; AT&T Comments On The Proposal of the State Members Of The Federal-State Joint Board (December 18, 1992) at 6.

48. We recommend that Alascom be directed to use that transition payment to reduce its investment which, in turn, will lower its costs of operation as new technologies and more cost efficient, competitive equipment are introduced into the Alaska market. This is necessary to address, and balance, three of the Joint Board's goals: revenue requirement neutrality, rate integration, and universal service.[151]

116. The JSA is styled after the pre-divestiture settlements contracts that governed payments among carriers for jointly provided interstate services. "From the mid-1940s until the advent of access charges, most LECs recovered the bulk of their interstate revenue requirement through a 'pooling' process administered by AT&T known as settlements and division of revenues. This process was sometimes referred to as a 'partnership' because it permitted LECs to achieve a uniform, rate of return on their investment. It also helped AT&T maintain a nationwide average toll rate schedule."[152] As previously noted, the JSA was a similar pooling vehicle that Alascom and AT&T elected to use to achieve the rate integration requirement for the Alaska interstate market.

117. The Commission has ample authority under Sections 1, 4(i), and 201 of the Communications Act, *inter alia*, to require a transition payment to avoid the potentially harmful consequences of "depooling" that will result from terminating the JSA. There is clear precedent for using transitional inter-carrier payments to achieve valid Commission policy objectives. For example, the FCC mandated carrier common line ("CCL") pooling in creating the post-divestiture access charge structure.[153] The mandate was needed because the Commission believed that LEC-specific CCL rates might generate significant pressures upon IXCs to deaverage interstate toll rates. CCL pooling was identified as a mechanism to forestall this eventuality.

118. The Commission recognized, however, that not all consequences of CCL pooling were beneficial, as it was found that pooling limited LEC cost recovery flexibility, established economically inefficient cost/price distortions, and reduced LEC incentives to contain costs.[154] In light of those concerns, the Commission directed the CC Docket 80-286 (Separations) Joint Board to study those issues and sought comments and recommendations on possible modifications to the mandatory CCL pooling of costs and revenues. In response, that Joint Board found that several features had been implemented to mitigate the concern for toll rate deaveraging.[155] The Separations Joint Board found that the mandatory CCL pooling was broader than necessary to achieve the intended public interest benefits and was a hindrance to achieving two goals of access charges: enhanced incentives to contain costs and the elimination of economically inefficient cost/price distortions.[156]

119. In reducing the mandatory aspects of CCL pooling, the Joint Board recommended transitional mechanisms to forestall the possibility that "depooling, particularly precipitous depooling, could adversely affect the telecommunications marketplace and cause hardship in many areas of the country for ratepayers and LECs alike."[157] Carriers electing to withdraw from the CCL pool would be required as a pre-condition of withdrawal to pay a four year transitional support into the pool, which would be used to provide transitional support payments to LECs that traditionally were net receivers under the mandatory pooling program, but were projected to withdraw from the revised, "voluntary" pool.[158] In addition, a mandatory long term support fund was established to enable those LECs remaining in the pool to charge IXCs the equivalent of what would have been the nationwide average CCL rate had the mandatory CCL pool been maintained.[159] This long term support feature was needed to assure the forestalling of pressures to deaverage toll rates.[160]

120. The Commission adopted the Separations Joint Board's recommendations concerning the revisions to the mandatory CCL pool, concluding:

> The Joint Board has recommended a carefully integrated plan of action for resolving a variety of issues concerning common line cost recovery. These recommendations are designed to further all four of the long standing goals of this proceeding – preserving universal service, promoting economic efficiency, eliminating service pricing discrimination, and deterring uneconomic bypass – and to achieve a proper balance among these goals.[161]

121. On reconsideration, the Commission affirmed its earlier conclusion and observed that the long term support arrangement among all LECs was needed to ensure that small, unaffiliated LECs with high nontraffic sensitive costs would not be forced to impose inordinately high nontraffic sensitive cost recovery burdens on their subscribers.[162]

122. The transition payment we are recommending as part of the Alaska market recommendation closely parallels the transitional support payments required pursuant to the CCL pooling revisions discussed above. First, both payments are transitional in nature. The courts have recognized that the Commission has the authority to prescribe transitional policy mechanisms to assure the preservation of universal service and to avoid service disruptions.[163] Sec-

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[151] The availability of telecommunications services over the great distances and under the disruptive climatic conditions in Alaska is essential to the safety of life and property as well as the health and well-being of Alaskans. In our judgment, the transition payment recommended herein is essential to making "available, *so far as possible*, to *all* the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communications service with adequate facilities at reasonable charges," as required by the Communications Act. 47 U.S.C. § 151.

[152] *In the Matter of MTS and WATS Market Structure*, 2 FCC Rcd 2324, para. 112 (1987) *See also id.* at para. 112 n.171.

[153] *Third Report and Order, MTS and WATS Market Structure*, CC Docket No. 78-72, 933 FCC 2d 241 (1983)(hereinafter "Access Charge Order").

[154] *In the Matter of MTS and WATS Market Structure*, CC Docket No. 78-72, 2 FCC Rcd 2324, para. 115 (1987); *In the Matter of MTS and WATS Market Structure*, CC Docket No. 78-72, 2 FCC Rcd 2953, para. 23 (May 19, 1987).

[155] *In the Matter of MTS and WATS Market Structure*, 2 FCC Rcd 2324, paras. 117-120 (1987).

[156] *Id.* at para. 120.

[157] *Id.* at para. 121.

[158] *Id.* at para. 98.

[159] *Id.*

[160] *Id.* at para. 127.

[161] *Id.* at para. 27.

[162] *In the Matter of MTS and WATS Market Structure*, CC Docket No. 78-72, 3 FCC Rcd 4543 (1988).

[163] *NARUC v. FCC*, 737 F.2d 1095, 1135 n.35 (D.C. Cir. 1984).

ond, there is significant similarity between the goals underlying the CCL pooling revisions -- universal service and economic efficiency -- and the Joint Board's goals. Third, both the required AT&T payment under the Alaska market transition mechanism and the transitional support payments under the CCL pooling revisions concern intercarrier payments. Fourth, the payments pursuant to each proceeding were an integral part of an overall plan to achieve a proper balancing of competing policy considerations.

123. The Commission's authority to order pooling arrangements such as the recommended payment has been affirmed upon judicial review. In *Rural Telephone Coalition v. FCC*, 838 F.2d 1307 (D.C. Cir. 1988), the United States Court of Appeals for the District of Columbia Circuit ruled that the Commission had the authority to create the mandatory pooling arrangement known as the Universal Service Fund to assist certain high cost local companies to maintain universal service. The creation of the fund was challenged on appeal as a subsidy prohibited under the Communications Act. The Court viewed the allocation of costs underlying the Fund as "a step on the road towards an efficient national telephone rate structure based primarily on access charges levied directly on customers."[164] The FCC's statutory authority pursuant to Sections 1 and 4 of the Communications Act, 47 U.S.C. §§ 151 and 154, was approved as the basis for mandating the Fund. Additional challenges to the specific features of the Fund were raised, with the principal objection that the Fund would not necessarily achieve its intended purposes. The Court dismissed these challenges, noting:

> The fund as proposed may well produce anomalous results, and there may be better' means of aiding the truly needy. [citation omitted.] Our task, however, is not to determine the best means, but only to decide whether the means selected by the Commission are lawful, supported by substantial evidence after consideration of relevant factors, and rationally connected to the facts. The Commission determined that the Fund would serve the statutory objective of universal service at reasonable charges. 47 U.S.C. Section 151 (1982). The Fund was not proposed as a welfare scheme; if it were, the Commission would have exceeded its authority. Rather, the Commission seeks to moderate excessive NTS local exchange plant costs in order to ensure that rates are within the means of the average subscriber. As an interim measure, this decision was within the Commission's discretion.[165]

124. The transition payment is an integral part of our recommendation that is designed to preserve universal service and revenue requirement neutrality by permitting Alascom to continue to provide service throughout Alaska during a period of rapidly accelerating, but selective, competition that would drain Alascom revenues where Alascom is most vulnerable competitively, thereby impairing its continued ability to provide interconnecting services throughout the state.[166] We thus conclude that the Commission has the requisite authority to require the transition payment from AT&T to Alascom.

125. The obligation to provide the intercarrier transition payment rests with AT&T. AT&T was initially required to provide rate integrated services and to serve the Alaska interstate market jointly with Alascom in connection with the Commission's provision of satellite acquisition and operation authority to AT&T. That requirement was imposed solely on AT&T prior to the advent of competition in the interstate MTS market. However, as discussed above, AT&T and Alascom jointly negotiated and implemented the JSA during a period when competition had been authorized and had begun to be implemented for the interstate MTS market in the Lower 48. Nevertheless, AT&T did not object to its responsibility for this obligation when it was initially imposed, despite the existence of, and the real potential for, competitors in the market in light of competitive policies that were then being adopted by the Commission. While objections to the continuation of the JSA were raised later by AT&T, they did not go to the sole service responsibility issue.

126. When imposing rate integration responsibility for the interstate Alaska market on AT&T, the Commission acknowledged AT&T's dominance in the interstate MTS market.[167] This classification continues today. In addition to preserving universal service, maintaining revenue requirement neutrality, and encouraging economic efficiency, the transition payment is necessary to maintain the rate integration goal that has been a guiding policy for structuring the Alaska interstate MTS market since 1972 and is one of the Joint Board's goals.[168]

127. We have thus concluded that the transition payment, and phased reduction in AT&T's required use of Alascom facilities, together with our recommendation that the Commission maintain the current frozen allocator, will maintain our goals of universal service and revenue neutrality.

ii. Amount of Payment

128. Rather than an ACR mechanism that would involve accelerated depreciation, we have decided to recommend that a reduction in Alascom's plant balances be funded by a transition payment to Alascom of $150 million in two installments ($75 million on March 1, 1994; and $75 million upon termination of the JSA).[169] We have concluded that this payment will meet the goal of revenue require-

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[164] *Rural Telephone Coalition v. FCC*, 838 F.2d 1307, 1314-15 (D.C. Cir. 1988).

[165] *Id.* at 1316.

[166] At present, only Alascom provides universal connectivity throughout the State of Alaska.

[167] *See, e.g., In the Matter of Establishment of Domestic Communications-Satellite Facilities by Non-Governmental Entities*, Docket No. 16495, 35 FCC 2d 844, paras. 5, 9 (1972).

[168] Without an acceptable transition payment mechanism the Joint Board would be unlikely to recommend termination of the JSA.

[169] This recommendation is a variation on the proposal we identified in the *Tentative Recommendation* that recommended reducing net plant balances by accelerating depreciation. We now achieve the same end result by simply crediting the plant accounts without accelerating the depreciation rate. We have reviewed the comments suggesting various ways to construct and target an appropriate ACR mechanism. Alascom's costs are primarily a combination of plant costs and operating (*i.e.*, non-plant related) expenses. Unquestionably, Alascom has greater control over its operating expenses than its plant costs which are largely a function of the existing equipment in service (*e.g.*,

ment neutrality.[170] Support for this conclusion is contained in the data underlying the intrastate revenue requirement increases that were predicted and filed by the principal parties to this proceeding.

129. Specifically, we note first that in the Master Agreement filed jointly by AT&T and Alascom in January, 1992, those parties stated that the phase-down of the frozen factor used by Alascom to allocate interexchange circuit equipment would cause an increase in intrastate revenue requirements of approximately $32 million. Alascom stated that this increase was caused by a drop in the factor from its current level of 86% interstate to the level of 62% interstate. Thus, a factor drop of 24% produces an approximate $32 million shift or $1,333,333 for each 1% change in the allocator.

130. In its implementation plan, Alascom provided a "Case A Analysis" that estimated the financial impact of the *Tentative Recommendation*. In its analysis, Alascom factored in the impact of the transition mechanisms outlined in the *Tentative Recommendation*. Case A showed that intrastate revenue requirements would decrease during the early years due to the $150 million ACR payment and then steadily increase in the later years as a result of the decreases in the allocation factor and in AT&T usage. Alascom shows that the largest increase in intrastate revenue requirements occurs between 1996 and 1997, approximately $12 million.

131. We have examined the differences between the transition mechanisms, and their timing, that are contained in the *Tentative Recommendation* and that are being recommended in this Final Recommended Decision. When these differences are superimposed on Alascom's Case A Analysis, the increased intrastate revenue requirements predicted by Alascom to start in 1997 will largely disappear given a $150 million plant reduction. Particularly significant is the change in our recommendation regarding the frozen factor. As shown above, the previously recommended drop of 11% in the interstate allocation factor would have produced a shift to intrastate in the order of $14.7 million.[171] Under our current recommendation, this shift will not occur. Further, as discussed below, we are recommending that the transition payment be applied to provide a substantial reduction of the COE switching investment costs. Together, these actions should practically eliminate intrastate cost shifts related to investment. The anticipated decreases in AT&T usage of Alascom's facilities will have very little impact if the majority of Alascom's net COE switching investment and an adequate amount of plant in other plant accounts are no longer on the books to be allocated between the jurisdictions.

132. We also considered possible cost shifts to the intrastate jurisdiction occurring after all the transition mechanisms have been implemented. We have considered the materials in the record and have adjusted the Part 36 Separations Study (base case) provided by Alascom in response to Staff Data Request No. 6[172] to reflect forecasted growth factors taken from Alascom's Case A Analysis[173] and the transition mechanisms, including the transition payments recommended in this order.[174] We conclude that there would be no intrastate cost shift given our transition mechanisms and market recommendations.

133. In summary, we conclude that the recommended transition payment to reduce Alascom's investment costs, coupled with the retention of the frozen factor and the crediting of specific Alascom plant accounts for reduction, should achieve the goal of revenue requirement neutrality.

b. Accounting Issues

134. We recommend that the transition payment be applied exclusively to offset certain designated plant account balances.[175] Section 220 of the Communications Act gives the Commission the authority to prescribe the manner in which carriers may keep their regulated books of account. The Commission has adopted accounting rules pursuant to Section 220; they are found in part 32 of the Commission's rules.[176] Part 32 provides no specific accounting instructions for the transition payment in this situation. Therefore, the Commission should be able to prescribe the

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network configuration, switch size). While a few commenters have suggested a need to consider an ACR for Alascom's expenses, no proposal, with the exception of Alascom's proposed TCF, has been presented for our consideration. We are reluctant to propose a cost support mechanism for Alascom's operating expenses for several reasons: Alascom has control over a substantial portion of these costs and may reduce them at its discretion; it is not known what operating expenses, if any, might truly merit support under the new market conditions; and any subsidy to offset operating expenses would have no lasting effect on costs in that it would not eliminate costs, but merely change who pays the costs during the period payments are made. Consequently, we do not recommend adoption of an ACR that includes as a component the TCF proposed by Alascom or any similar payment mechanism to offset operating expenses. Furthermore, absent a change in the cost separations factor for circuit equipment, there are no data on the record to support the necessity of an operating expense subsidy for Alascom.

[170] We have assumed that the $150 million transition payment to be paid in two installments of $75 million each, the first installment on March 1, 1994, and the second installment, when the JSA terminates, on September 1, 1995) from AT&T to Alascom is taxable income to Alascom. However, we recommend that the parties be required to file, within 60 days of the effective date of the Commission's order, requests with the United States Internal Revenue Service ("IRS") and with the State of Alaska for expedited rulings on whether the transition payment is, in whole or in part, taxable income. If the IRS and/or the State of Alaska conclude(s) that the transition payment is not taxable income to Alascom, then AT&T may request that the Commission reduce the second installment by the amount of the tax payment(s) that Alascom is not required to make. If reduction in the second installment is thus warranted, we recommend that the Commission adjust the second installment to reflect the results of the requested rulings.

[171] This figure assumes an approximate $1.3 million increase in state costs per 1% change in allocator.

[172] Alascom 1993 Separations Study, Business as Usual, ROR, 14%, designated "1993 AKBAS93" by Alascom. *See* Response to Data Request 6, filed July 23, 1993.

[173] *See* Alascom's Implementation Plan Response (July 7, 1993).

[174] The adjustments include: (1) the implementation of transition mechanism included herein from 1994-1997; (2) two separations factor changes: tandem (reduced from 59% interstate to 25% interstate) and dial switching (reduced from 88% interstate to 25% interstate) to reflect the potential loss of AT&T usage in the non-Bush areas after the transition period; (3) plant reductions, net of taxes, to reflect the transition payment; and (4) tax rates: 34% federal and 9.5% state.

[175] The transition payment is to be applied to plant balances prior to the separations process.

[176] 47 C.F.R. §§ 32.1 *et seq.*

proposed accounting treatment as long as that treatment is consistent with the purpose of the payment. The purpose of the transition payment is to ameliorate the effects of jurisdictional shifts and ensure that the Commission's universal service mandate is not undermined by termination of the JSA.

135. Accordingly, we recommend that the $150 million transition payment be made in two installments ($75 million on March 1, 1994 and $75 million when the JSA terminates) and be applied to reduce the book cost of depreciable Alascom assets. The payment should not be applied to non-depreciable assets such as "Land" (Account 2111) nor to amortizable assets such as "Capital Leases" (Account 2681).[177] The application of the transition payment to the remaining depreciable assets only, recognizes that future, as well as current, Alascom customers (including AT&T) should benefit from the transition payments.

136. We further recommend that the payment amount be assigned to specific depreciable asset accounts in accordance with the following guidelines. Of particular concern is the potential increase in intrastate costs caused by a change in the jurisdictional allocation of switching investment that could result from decreased AT&T usage of Alascom's switches under the new market structure. Therefore, we recommend that "Central Office Switching" (Account 2210) be designated first for reduction and by an amount necessary to produce little or no increase in intrastate revenue requirements as a consequence of AT&T's decreased switching usage. The remaining depreciable accounts should be reduced proportionately based on their relationship to the total net investment in depreciable assets (excluding the Alaska Spur).[178] It is our conclusion, based on adjustments to Alascom's Part 36 Separations Study, that allocation of the $150 million in this manner will ensure that our revenue requirement neutrality goal is met. This allocation will also mitigate incentives for making more selective distribution of the transition payment in response to competitive pressures with resulting undesirable effects on our revenue requirement neutrality objective.

137. In order to ensure proper assignment of the transition payment to depreciable asset accounts, we recommend that Alascom be required to file with the Commission a detailed proposal for its treatment of the transition payment. We further recommend that the Commission review Alascom's then current end-of-year balances (by account) for gross investment, depreciation reserve, and net investment to verify that the $150 million transition payment (to be paid in two installments of $75 million each) is applied in accordance with this decision.

c. AT&T's Use of Alascom Facilities

138. The *Tentative Recommendation* proposed that AT&T's obligation to use Alascom facilities be phased-out by reducing the percentage of traffic that AT&T must place on the Alascom system over four years in four equal increments or on a schedule proposed by the parties and accepted by the Commission. Those filing comments primarily addressed the timing of AT&T's obligation and not the methodology proposed under the *Tentative Recommendation*.

139. We have reconsidered our previous approach on this matter and recommend that AT&T be required to buy a fixed dollar amount of service from Alascom as opposed to a specific minutes requirement. Our review concluded that it would be administratively impracticable to identify specifically whether the minutes standard should apply to transport minutes, switched minutes or both. Furthermore, employing a dollars standard would simplify the process, would protect against rapid losses in interstate revenue streams to Alascom, thus further buffering the effects of the loss in AT&T's traffic, and would allow AT&T greater flexibility in deciding how to meet its purchase obligations in a manner best suited to its future construction plans. Consequently, we now recommend that AT&T be required to purchase a set level of dollars of service from Alascom during this phase of the transition period.[179]

140. The purchase level for the phase down related to interstate MTS Common Carrier Services would be computed based on a declining percentage over the transition period applied to a baseline revenue amount. The baseline would be calculated as a function of the demand for transport and switching minutes for the last 12 months that the JSA was in effect multiplied by the new tariff rates for Alascom's Common Carrier Services.[180] The required level (percentage) would be reduced in increments every six months over the transition period until it reaches zero at the end of the period.[181]

141. We continue to recommend that AT&T and Alascom be allowed to propose jointly an alternative method for calculating AT&T's service obligation to use Alascom's Common Carrier Services on a declining scale for the second portion of our recommended transition period. If no joint alternative is forthcoming, our recommended method should be adopted.

C. Alascom Common Carrier Services Tariff

142. As previously discussed, it is our recommendation that the ultimate rate structure for Alascom's Common Carrier Services would be a tariff with two geographic rate zones based on the respective costs of its facilities

[177] We also recommend that the balance in "Deep Sea Cable" (Account 2425) not be reduced. We agree with AT&T that this account should not be reduced, principally because it is highly unlikely that the wholly interstate usage of this facility will change under the new market structure. Thus, the Alaska Spur is not expected to be the cause of any intrastate cost shifts.

[178] No plant account should be credited with an amount greater than the net balance in that plant account to prevent the new net balance in the account from falling below zero.

[179] In order to achieve our objectives, this dollar commitment must be associated only with services currently provided to AT&T by Alascom under the JSA. For example, AT&T will not be able to meet its dollar commitment by purchasing intrastate services from Alascom.

[180] These new tariffs, as noted elsewhere in this order, would reflect Alascom's reduced costs after application of the transition payment installments.

[181] The percentage of baseline revenues to be used for each six month period is as follows: 90% during the first period; 80% during the second period; 65% during the third period; 45% during the fourth period; and 20% during the last period. These percentages will ensure a controlled reduction to AT&T's pur-

monopoly and competitive operations.[182] In order to achieve this new rate structure, a number of transitional steps must be taken. First, Alascom would be required to file a detailed CAP that explains how costs would be allocated between these two geographic rate zones. After the CAP has been approved or modified by the Commission, Alascom would apportion its costs to the two categories according to the CAP and then assign the costs within each category to major service subsets (*e.g.*, switching, transport). Alascom's cost of service data and the data supporting the CAP would be reviewed and would be subject to an independent audit.

143. Once costs were properly defined, Alascom would estimate its demand for services and develop rates for inclusion in its Common Carrier Services tariff. The tariff would then be evaluated under the Commission's standard tariff review process. It is recommended that Alascom be directed to file that tariff as soon as possible, with an effective date of September 1, 1995, since a lawful tariff must be on file prior to the termination of the JSA. The Common Carrier Services tariff would be effective upon, and coincident with, the date of termination of the JSA. It is further recommended that the tariff be refiled annually for the first few years with the Commission later determining if less frequent tariff filings would be appropriate.

VI. MISCELLANEOUS

A. Tariffs, Leases, and Contracts

144. The *Tentative Recommendation* suggested that Alascom be required to file interstate tariffs for its MTS and Common Carrier Services. Also, any contracts or leases for Alascom or AT&T services would be filed for review with the Commission.

145. There were no comments opposing the recommendations that Alascom's MTS and Common Carrier Services be tariffed or that contracts or leases for Alascom or AT&T services be filed with the Commission for review. AT&T supported the tariffing requirement for Alascom;[183] and Alascom, as a common carrier, is required by the Communications Act to file tariffs.[184]

146. In addition, we believe it is necessary that, if contracts or leases between Alascom and AT&T for services are authorized by the Commission, they be filed for Commission review to assure that the market transition fulfills the Joint Board's goals of fostering economic efficiency and competition and that service is provided in a just and reasonable manner.[185]

B. Alaska Spur

147. In the *Tentative Recommendation*, we proposed that Alascom must file with the Commission for its review all contracts and agreements for interstate service on the Alaska Spur, including any technical standards that may be incident thereto.

148. In its Implementation Plan Alascom stated that it would like to engage in market pricing for the Alaska Spur.[186] GCI expressed concern about Alascom's intention and stated that, since Alascom controlled this essential facility, it must not be permitted to engage in extortionate pricing.[187] AT&T supported cost-based pricing for the Alaska Spur and also requested that the rates be tariffed, or offered on a non-discriminatory contract basis, until an alternative, competitive fiber optic facility linking Alaska and the Lower 48 becomes available.[188]

149. The comments generally support the requirement that the terms and conditions offered by Alascom for use of the Alaska Spur must be public and non-discriminatory. Whether Alascom uses a tariff or files various contracts with the Commission, this requirement must be met. Regarding the pricing for the use of the Alaska Spur, the Joint Board recommends that Alascom must comply with relevant cost-of-service principles. Since the contracts, leases, or tariffs governing use of the Alaska Spur will be submitted for Commission review, the Joint Board concludes that pricing issues can be considered further at that time as necessary.

C. Monitoring

150. In the *Tentative Recommendation* we stated that progress in achieving the proposed market structure should be monitored by the Commission, using information obtained from existing sources. No party suggested any significant refinement in the level of monitoring that was recommended, and we continue to believe that this facet of the *Tentative Recommendation* is adequate. We further conclude that the changes to our initial market structure proposal recommended in this order do not rise to a level that requires modification to our monitoring mechanism. Consequently, we recommend that the Commission monitor the progress made in achieving the market structure proposed in this order by employing existing information sources.

D. Procedural Issues

151. Alascom has presented several challenges to how the Joint Board conducted this proceeding. First, it disputes the classification of this Docket as a nonrestricted rulemaking proceeding for the purpose of the Commission's *ex parte* rules.[189] Related to this claim is Alascom's second contention that the Joint Board has not complied with the Commission's *ex parte* rules applicable to nonrestricted rulemakings.[190] Third, Alascom claims that

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chase obligation that protects the public interest.

[182] Use of the geographic rate zones should not be interpreted as placing restrictions on the rate design within each zone.

[183] AT&T Comments (June 28, 1993) at 29.

[184] 47 U.S.C. § 203. These new tariffs, as noted elsewhere in this *Final Recommended Decision*, would reflect Alascom's reduced costs after application of the transition payment installments.

[185] The terms, rates, and conditions of any contract between AT&T and Alascom must be available to all similarly situated customers.

[186] Alascom Implementation Plan (June 7, 1993) at 24.

[187] GCI Comments (June 28, 1993) at 7.

[188] AT&T Comments (June 28, 1993) at 29.

[189] Alascom Comments (July 12, 1993) at 56-59.

[190] *See, e.g.*, PTI Letter of November 10, 1992 addressed to the State Joint Board Commissioners; Alascom Request for Supplementation of Record (June 15, 1993); Alascom Comments (July 12, 1993) at 59-61.

the Joint Board has failed to comply with the open meeting requirements of the Government in the Sunshine Act ("Sunshine Act").[191] Finally, Alascom alleges that the Commission violated its rules by failing to provide written notice to the parties of a public Alaska Joint Board hearing held in Anchorage on July 1, 1993, or Federal Register notice prior to that day.[192] As the discussion of each claim below indicates, none of these contentions has any merit.

1. Classification of CC Docket No. 83-1376 as a Nonrestricted Rulemaking

152. Alascom asserts that the Commission did not comply with Section 410 of the Communications Act and with various provisions of the Administrative Procedure Act ("APA") when it established the Alaska Joint Board proceeding as an informal notice and comment rulemaking subject to non-restricted "permit but disclose" *ex parte* rules. Section 410(a) provides that a joint board established pursuant to that section has "all the jurisdiction and powers conferred by law upon an examiner provided for in section 3105 of Title 5 [*i.e.*, an administrative law judge ("ALJ")], and shall be subject to the same duties and obligations." 47 U.S.C. § 410(a). Likewise, section 410(c), under which the Alaska Joint Board was established,[193] provides that a joint board created under that section "shall possess the same jurisdiction, power, duties, and obligations as a joint board established under [section 410(a)]." 47 U.S.C. § 410(c). Alascom argues that these provisions require the Alaska Joint Board to follow the same APA prohibitions on *ex parte* presentations that apply to formal rulemakings and adjudications conducted by ALJs.

153. Alascom's argument is not supported by the language of either Section 410 or any other law, including the APA. Section 410 itself does not prohibit *ex parte* presentations but merely states that joint boards have the same powers, duties, and obligations as ALJs. Although ALJs are subject to the APA, nowhere in the APA is there a duty or obligation imposed on an ALJ not to receive *ex parte* presentations under any circumstance. Rather, the APA *ex parte* prohibitions, 5 U.S.C. § 557(d)(1), apply only in those proceedings "required by statute to be determined on the record after opportunity for an agency hearing. . . ." 5 U.S.C. §§ 553(c), 554(a). The Supreme Court has strictly applied the requirement that this language (*i.e.*, "on the record after opportunity for an agency hearing") be present in the statute under examination to trigger the hearing provisions of the APA. *See U.S. v. Florida East Coast Railway Co.*, 410 U.S. 224, 234-38 (1973); *see also AT&T v. FCC*, 572 F.2d 17, 22 (2d Cir.) *cert. denied*, 439 U.S. 875 (1978). Section 410 of the Communications Act does not contain this required "on the record" language, or anything remotely resembling it. In addition, Section 410(a) expressly provides that proceedings conducted under that section shall be conducted "in such manner as the Commission shall . . . prescribe."[194] It is thus apparent that the Section 410(a) language concerning "duties and obligations" of joint boards was not intended to dictate the procedural requirements of joint board proceedings.

154. Moreover, as discussed below, the legislative history of Section 410 confirms that Congress did not intend the language quoted by Alascom to require "on the record" joint board hearings with the associated *ex parte* prohibitions. Rather, the legislative history indicates that the references to ALJs in Section 410 were intended simply to limit the joint board's authority to the issuance of "recommended" decisions and thereby to protect the authority of the Commission to issue a final decision.

155. By way of background, in its original form prior to 1952, section 410(a) provided that joint boards "shall be vested with the same powers and be subject to the same duties and liabilities as in the case of a member of the Commission when designated by the Commission to hold a hearing [under section 409]." *See* H.R. Rep. No. 1750, 82d Cong., 2d Sess., *reprinted in* 1952 U.S. Code Cong. & Ad. News 2234, 2255. In 1952, however, Congress amended section 409 and abolished the former procedure whereby single commissioners could preside over cases designated for hearing. In an attempt to conform section 410(a) to the new requirements of section 409, Congress concurrently amended section 410(a) to provide that joint boards "shall have all the jurisdiction and powers conferred by law *upon the Commission*, and shall be subject to the same duties and obligations." *See id.* (emphasis added).

156. From the Commission's perspective, this delegation of authority proved "undesirably broad" and the Chairman of the FCC advised Congress in 1955 that "it does not seem likely that the Commission would ever find it desirable [under the language of the 1952 amendment] to refer any matter to a joint board." *See* H.R. Rep. No. 2540, 84th Cong., 2d Sess., *reprinted in* 1956 U.S. Code Cong. & Ad. News 4134, 4139. The Chairman requested that Congress change the statutory language to give joint boards the same jurisdiction that is conferred on a hearing examiner, which "would be more nearly what Congress must have intended and would make the section more usable to the Commission in the administration of the act." Congress granted this request and in 1956 amended section 410(a) to give joint boards "the same power as is now conferred on hearing examiners, *thus giving the full Commission an opportunity to act before a final determination is made in a particular case referred to a joint board*." *Id.* at 4134 (emphasis added). The legislative history thus indicates that Congress amended section 410(a) of the statute to make clear that a joint board cannot take final action and that it acts essentially in an advisory capacity to assist the Commission.

157. This interpretation also is supported by the express language of Section 410(c), added by Congress in 1971, providing for mandatory referral to a joint board concern-

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[191] PTI Letter of November 10, 1992 addressed to the State Joint Board Commissioners; Alascom Comments (July 12, 1993) at 59-62.

[192] Alascom Request for Supplementation of Record (June 15, 1993); Alascom Comments (July 12, 1993) at 61.

[193] *Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers between the Contiguous States and Alaska, Hawaii, Puerto Rico and the Virgin Islands*, CC Docket No. 83-1376, *Notice of Proposed Rulemaking*, FCC 85-520, paras. 2, 25 (released Sept. 27, 1985), 50 Fed. Reg. 41714 (1985). The order establishing the Alaska Joint Board stated that the proceeding would be subject to non-restricted *ex parte* procedures. It is unclear why Alascom waited eight years to object to this decision.

[194] In this regard, the Commission's rules provide that Joint Board proceedings are generally subject to non-restricted *ex parte* procedures. 47 C.F.R. § 1.1206(b)(10).

ing matters pertaining to jurisdictional separations and discretionary referral for any other matter relating to common carrier communications of joint federal-state concern. As noted above, section 410(c) provides that joint boards established under that section "shall possess the same jurisdiction, powers, duties, and obligations as a [section 410(a) joint board], *and shall prepare a recommended decision for prompt review and action by the Commission.*" 47 U.S.C. § 410(c) (emphasis added). *See also* S. Rep. No. 362, 92d Cong., 1st Sess., *reprinted in* 1971 U.S. Code Cong. & Ad. News. 1511, 1514 ("As in section 410(a) of the act, the proposed section 410(c) would provide that the joint board's decision is the equivalent of an examiner's opinion in that it would prepare a recommended decision for prompt review and action by the Commission."). Again, the emphasis is on precluding a joint board's ability to take final action, rather than mandating formal adjudicative procedures.

158. Further, nowhere in the legislative history is there any indication, either expressed or implied, that Congress intended to mandate that joint boards conduct formal proceedings subject to restricted *ex parte* procedures. To the contrary, the legislative history to the enactment of section 410(c) evidences a congressional understanding that joint board proceedings would be conducted as informal, notice and comment rulemaking proceedings, not as APA on-the-record proceedings. After referring to a previous FCC federal-state joint board conducted as an informal rulemaking, the Senate Report indicated that the 1971 amendments "would make mandatory the procedures voluntarily followed in the prior joint board proceeding." *Id.* at 1514. The legislative history then explicitly indicated that joint board referrals under section 410(c) would follow "once the Commission institutes a notice of proposed rulemaking proceeding . . . ." *Id.* at 1515. Consistent with this approach, the Commission generally treats joint board proceedings as informal notice and comment rulemakings. *See* 47 C.F.R. § 1.1206(b)(10) (1992); *Amendment of Subpart H, Part 1 of the Commission's Rules and Regulations Concerning Ex Parte Communications and Presentations in Commission Proceedings*, 2 FCC Rcd 6053, para. 17 (1987) ("Joint Board proceedings ordinarily are in the nature of rulemakings and therefore follow generally the non-restricted *ex parte* rules.").

159. It is thus abundantly clear that section 410 of the Communications Act and the APA do not require use of restricted *ex parte* procedures for joint board proceedings. Moreover, this proceeding is not one that would require a formal, evidentiary hearing with restricted *ex parte* procedures as a matter of "basic fairness." *See Sangamon Valley Television Corp. v. USA*, 269 F.2d 221, 224 (D.C. Cir. 1959). While Alascom asserts that the proceeding implicates "conflicting private claims to a valuable privilege," *id.*, this is not the case. Rather, the proceeding involves a determination of the future market structure for Alaska telecommunications in which multiple competitors will be free to enter and exit the market. In making its recommendations to the Commission, the Joint Board must balance various policy considerations that affect numerous parties in the interstate market. Even though the recommendations include termination of the JSA and a transitional payment, which is necessary to accomplish certain policy goals, the proceeding cannot be characterized as involving competing claims to a valuable privilege.[195]

160. In sum, the Joint Board's use of informal notice and comment rulemaking procedures is fully in accord with the law.

2. Compliance with *Ex Parte* Procedures

(a) November 1992 meetings

161. Alascom claims that various meetings among the Joint Board State Commissioners and individual parties held in November of 1992 would violate the FCC's *ex parte* rules unless each *ex parte* meeting was memorialized in the record and public comment could be made on each such record.[196] A similar issue was raised in Alascom's June 15, 1993, Request for Supplementation of Record.

162. Alascom's arguments are without merit because the Joint Board State Commissioners and Staff complied with the Commission's *ex parte* procedures. Section 1.1206 of the Commission's rules prescribe requirements that govern *ex parte* contacts. Oral *ex parte* contacts are permissible, provided that any data or arguments not already in the record are submitted in writing for the record. The public record establishes that the *ex parte* rules were followed in the conduct of the November, 1992 meetings at issue. Three of the four State Joint Board Commissioners and various State Staff collectively conducted separate meetings with representatives of Alascom, AT&T, GCI and the State of Alaska. At the commencement of each meeting, the Joint Board members reminded each party of its responsibilities under the rules to submit a summary of the discussion for the record. The public record reveals that each party complied in fact with the rules and submitted a summary.[197]

(b) Overland Consulting, Inc's. Participation and Compliance with the *Ex Parte* Rules

163. In its July 12, 1993, Comments on the *Tentative Recommendation*, Alascom argues that a private presentation by Overland to the State Commission Members and Staff of the Joint Board at the Seattle meeting in July 1992 constitutes an *ex parte* rule violation. Alascom stated its belief that Overland was hired by the State of Alaska , a party to the proceedings. Alascom alleges that neither the fact nor substance of this meeting is reflected in the record, as required by the Commission's rules. Alascom also asserts

[195] In addition, subsequent to *Sangamon Valley*, the Supreme Court admonished the courts not to force an agency to provide procedures more demanding than those required by statute or the Constitution absent "extremely compelling circumstances." *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 543 (1978). Such circumstances do not exist here.

[196] PTI Letter of November 10, 1992 signed by Alan Y. Naftalin addressed to the Joint Board State Commissioners. *See also* Alascom Comments (July 12, 1993) at 62.

[197] State of Alaska *Ex Parte* Meeting Report of November 16, 1992 (November 23, 1992); AT&T Report of *Ex Parte* Meeting of November 16, 1992 (November 18, 1992); Alascom *Ex Parte*

that the Memorandum of Principles reflecting the State Members' views, issued after the Seattle meeting, indicates that Overland's report influenced the State Members.[198]

164. Alascom's argument rests on its belief that Overland is working for the State of Alaska. However, this fundamental assumption is incorrect. A review of Attachment 10, the Request for Proposal governing Overland's contractual responsibilities, reveals the following:

> 1. The contract solicitation was issued by the APUC, which is a division of the Department of Commerce and Economic Development. RFP, p. 5, no. 1.
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> 2. The purpose of the contract was for "[s] ervices of a contractor to aid the APUC in its investigation of the interstate issues associated with the Master Agreement... and [t]he contractor shall analyze and makes recommendations concerning. . . the issues before the CC Docket No. 83-1376 Joint Board." *Id.*
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> 3. The issuing office of the RFP is the APUC. RFP at 6.
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> 4. The scope of work required under the contract was anticipated to be supplementary to staff analysis:
>
> "Between now and the time that a contract is signed, Staff will be initiating its investigation and may well complete segments of the Scope of Work identified in this RFP. As a consequence, depending upon when a contract is reached, portions of the consultant's Scope of Work may no longer be necessary or may be reduced to reviewing or enhancing Staff's work." RFP at 24, no. 2t.[199]

165. Based on these provisions of the RFP, it is clear that Overland is working to assist Commissioner Knowles in her capacity as a member of this Joint Board, not for the State of Alaska. While obviously the APUC is part of the State of Alaska, there is a very significant distinction between the APUC's participation *on* the Joint Board and the State's participation as a party *before* the Joint Board. If the State of Alaska's and the APUC's interests were one and the same, there would be no reason for the State of Alaska to submit pleadings before the Joint Board since a member of the APUC (Commissioner Knowles) sits on the Joint Board. While Commissioner Knowles does not officially represent the view of the APUC on the Joint Board, it is significant to note that, other than two letters from its Chairman, the APUC has not filed pleadings in the Joint Board proceeding other than the initial Petition for Rulemaking that formed the basis for the FCC's initiation of a Notice of Inquiry regarding Alaska market issues. *See Notice of Inquiry*, CC Docket No. 83-1376, 96 FCC 2d 567 (January 4, 1984). Also significant is the fact that the initial Petition was filed by both the State of Alaska and the APUC, which clearly shows that these entities view themselves separately.

166. Additionally, Overland's work has been supervised by Commissioner Knowles and APUC Joint Board staff in their Joint Board capacities, not as employees of the State of Alaska or the APUC. This relationship was confirmed by the APUC Chairman in recent correspondence, which stated that "Overland was hired by the Alaska Public Utilities Commission to assist Commissioner Knowles and staff member Lorraine Kenyon *to perform their official duties with the Alaska Joint Board.*"[200]

167. The scope of work described in the RFP as quoted above in Point No. 4 demonstrates that Overland's work pursuant to the contract is the functional equivalent of State Joint Board staff, since the scope of Overland's work was contemplated by the RFP to be coordinated with State Joint Board staff work.

168. Since Overland was not representing an interested party to this proceeding, the Joint Board State Commissioners and Overland were free to meet and were not required to make an *ex parte* filing for the meeting. We note, however, that Overland's principal work product was a report dated July 21, 1992, which was entered into the public record of CC Docket 83-1376.

3. Applicability of the Sunshine Open Meeting Requirement to Joint Board

169. Alascom has challenged various meetings among Joint Board Commissioners that were closed to the public as violative of the open meeting requirement of the Government in the Sunshine Act. This challenge was raised with respect to the convening of meetings in Seattle among some of the Joint Board State Commissioners in July of 1992; meetings in Chicago of the four Joint Board State Commissioners and State Staff in October of 1992; meetings in Los Angeles among some of the Joint Board State Commissioners in November of 1992; and meetings in Washington, D.C. among some of the Joint Board Commissioners in February of 1993.[201]

Report of November 16, 1993 (November 20, 1993); GCI *Ex Parte Report, CC Docket 83-1376*, of November 16, 1993 (November 17, 1993).

[198] Alascom expressed similar concern in a letter addressed to Lorainne Kenyon, dated July 14, 1993, which was sent in response to her letter of July 9, 1993, which transmitted additional data requests related to Alascom's June 7, 1993 Implementation Plan.

[199] Alascom's Comments (July 12, 1993).

[200] Letter of July 22, 1993 addressed to Mr. John R. Ayers (emphasis supplied). This letter was submitted by Alascom to the public record in this proceeding by cover letter dated August 11, 1993. Although Alascom suggests that this correspondence bolsters its challenge to Overland's role in this proceeding, we disagree. We know of no prohibition, nor is one cited by Alascom, against one of the Joint Board State Commissioner's retention of consulting services to supplement staff analysis of the complex issues in this proceeding. Further, we reject Alascom's unsupported suggestion that the APUC's funding of this activity, rather than payment by the Commission, was somehow inappropriate. As noted above, the APUC hired and paid for a consultant to assist Commissioner Knowles without the authorization or assumption of any financial obligation by the Commission. Thus, Overland's compensation hardly qualifies as the type of expense item subject to Commission allowance and reimbursement under Section 410(a) of the Communications Act. Moreover, the APUC's payment for these services to Commissioner Knowles cannot be characterized as the indirect satisfaction of a governmental function that, in any measure, augmented the Commission's budget.

[201] PTI Letter of November 10, 1992, signed by Alan Y. Naftalin addressed to the Joint Board State Commissioners; Alascom Comments (July 12, 1993) at 59-60.

170. The Alaska Joint Board is comprised of four State members and three FCC Commissioners. Alascom argues that the fact that a quorum of the Joint Board (the four state members) met privately on several occasions violates the Government in the Sunshine Act.

171. We note initially that discussions at which a quorum of FCC commissioners are present constitute an FCC "meeting" under the Sunshine Act if the discussions are "'sufficiently focused on discrete proposals or issues as to cause or be likely to cause the individual participating members to form reasonably firm positions regarding matters pending or likely to arise before the agency.'" *FCC v. INT World Communications, Inc.*, 466 U.S. 463, 471 (1984) (quoting R. Berg & S. Klitzman, An Interpretive Guide to the Government in the Sunshine Act 9 (1978) (*"Interpretative Guide"*)). Thus, with respect to any meeting of the full Alaska Joint Board in which specific proposals or recommendations concerning the Alaska market are discussed, or any such meetings among Joint Board members in which three FCC commissioners are present, the Sunshine Act requires advance notification and the opportunity for public observation. Alascom has not alleged that any such non-public meetings occurred.

172. As to whether the Sunshine Act governs meetings of State Joint Board members constituting a quorum of the Joint Board when less than a quorum of FCC commissioners are present, we find that such meetings are not subject to the open meeting requirements of the Sunshine Act. While the Sunshine Act requires that any "meeting of an agency" be open to the public, 5 U.S.C. § 552b(b), we conclude that the discussions at issue were not "meeting[s] of an agency" governed by that Act.

173. The term "agency," for purposes of the Sunshine Act, means "any agency . . . headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, and any subdivision thereof authorized to act on behalf of the agency." 5 U.S.C. § 552b(a)(1). The term "meeting" means "the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business." 5 U.S.C. § 552b(a)(2). Finally, the term "member" means "an individual who belongs to a collegial body heading an agency." 5 U.S.C. § 552b(a)(3).

174. The statutory language makes clear that to be considered a "meeting" of the agency, there would have to be deliberations of individuals belonging to the collegial body heading the agency, *i.e.*, FCC commissioners. *See Hunt v. NRC*, 611 F.2d 33 (10th Cir. 1979). Most of the meetings referenced by Alascom included no FCC members and thus were not "meetings of the agency."

175. Although not raised by Alascom, we note that some FCC commissioners did attend two of the gatherings of the State members of the Joint Board mentioned by Alascom in their pleading. At one of these sessions two FCC commissioners who are members of the Joint Board independently made very brief appearances at the beginning but left before substantive discussions commenced. They did not participate in any way in deliberations of issues before the Joint Board and, thus, consistent with the definition of meeting, the open meetings requirement of the Sunshine Act did not apply.

176. There has been only one session involving the State Joint Board members where an FCC commissioner who is a member of the Joint Board attended and engaged in substantive discussions. We do not believe a session attended by only a single FCC Commissioner can be deemed "deliberations of" a "number of individual agency members" within the meaning of the term "meeting." Further, this one FCC Commissioner could not have been in the position to determine the "joint conduct or disposition of official agency business," 5 U.S.C. § 552b (a) (2), as the term "joint" necessarily implies the presence of more than one member of the Commission. Accordingly, we conclude that no Sunshine Act violation occurred.[202]

4. The Anchorage Public Hearing

177. On July 1, 1993, the Joint Board conducted a hearing in Anchorage in which interested persons, most especially Alaska residents, were permitted to make presentations regarding the proposals under consideration by the Joint Board. The federal and state commissioners participated in person and via satellite and telephone link-up. Alascom alleges that the Commission violated its own rules by failing to provide written notice to the parties of the Alaska proceeding regarding this public hearing and by failing to publish public notice of the meeting in the Federal Register until the day of the hearing.

178. Section 1.423 of the Commission's Rules, 47 C.F.R. Section 1.423 (1992), states that when the Commission requests oral argument in a rulemaking proceeding, it shall give written notice to the parties and publish notice in the Federal Register. As an initial matter, since this was a Joint Board hearing, not a Commission hearing, it appears that the rule is not applicable and that no violation occurred. But, to the extent the rule may be viewed as applying since all three FCC commissioners were present, it is not apparent what injury Alascom has suffered. It had actual notice of the meeting -- indeed, an Alascom representative made a presentation at the July 1 public hearing. To the extent a violation of section 1.423 occurred, it is difficult to construe it as anything more than harmless error, particularly given that reply comments to the hearing were permitted until July 12, 1993, and *ex parte* presentations were permitted thereafter.

VIII. ORDERING CLAUSE

179. ACCORDINGLY, pursuant to the authority contained in Section 410 of the Communications Act of 1934 As Amended, IT IS ORDERED THAT this *Final Recommended Decision* be transmitted to the Federal Communications Commission.

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[202] In our view, the three FCC commissioners on the Joint Board also are not a subdivision of the Commission. A subdivision must be "authorized to act on behalf of the agency." 5 U.S.C. § 552b (a). That requirement is not met since only the full Joint Board (of which the FCC commissioners are a minority) is authorized to make recommendations to the Commission and only the full Commission can act on those recommendations. Nor is the Joint Board a subdivision of the Commission, as it is not a subdivision of the "collegial body." *See* 5 U.S.C. §552b (a) (1); *Hunt v. NRC*, 611 F.2d at 336 n.2.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: May 11, 1994

FEE DECISIONS OF THE MANAGING DIRECTOR AVAILABLE TO THE PUBLIC

The Managing Director is responsible for fee decisions in response to requests for waiver or deferral of fees as well as other pleadings associated with the fee collection process. On a monthly basis, a public notice is released and the entire text of these fee decisions is published in the FCC Record.

The decisions are placed in General Docket 86-285 and are available for public inspection. A copy of the decision is also placed in the appropriate docket, if one exists.

The following Managing Director fee decisions are released for public information:

Cromwell Group, of Illinois, The - Request for refund of a hearing fee for a new FM station at Maroa, Illinois - **Granted** (March 29, 1994).

DeSoto Broadcasting Corporation - Request for refund of a hearing fee for a new FM station at Mansfield, Louisiana - **Granted** (April 18, 1994).

Henderson, Roy E. - Request for refund of a hearing fee for a AM station at Rosenberg-Richmond, Texas - **Granted** (April 15, 1994).

Hughes Communications Galaxy, Inc. - Request for partial waiver of the filing fee submitted in connection with its applications for a construction permit and to launch and operate a satellite - **Granted** (April 11, 1994).

Ketelsen, Lynn - Request for refund of hearing fee for a new FM broadcast station at Blooming Prairie, Minnesota - **Granted** (April 18, 1994).

New Horizons Broadcasting Partnership - Request for refund of a hearing fee for a new FM station at Whitesboro, New York - **Granted** (April 21, 1994).

ODON Communications Group I Limited Partnership - Request for refund of a hearing fee for a new FM station at Allouez, Wisconsin - **Granted** (April 18, 1994).

Rollings, Mark L. - Request for refund of a hearing fee for a new FM radio station at Maroa, Illinois - **Granted** (April 19, 1994).

Sky-Highway Radio Corp. - Request for partial refund of fees submitted in connection with its applications for launch and operational authority for two satellites and its applications to construct two satellites - **Granted** (April 11, 1994).

Spilman, Robert Dale - Request for refund of a hearing fee for a new FM station at Detroit Lakes, Minnesota - **Granted** (March 29, 1994).

University of Northern Iowa - Request for refund of the fee submitted in connection with its application for license to cover a transportable satellite earth station - **Granted** (March 29, 1994).

Volunteers in Technical Assistance - Request for waiver of filing fees required in connection with an application for authority to launch and operate and an application to construct an international non-profit, low earth orbit satellite system - **Granted** (March 25, 1994).

Walters, Patrick G. - Request for refund of a hearing fee for a new FM station at Stillwater, Oklahoma - **Granted** (March 29, 1994).

NOTE: ANY QUESTIONS REGARDING THIS REPORT SHOULD BE DIRECTED TO THE PREPARER, CLAUDETTE PRIDE, CHIEF, FEE SECTION ON (202) 632-0241.

FEDERAL COMMUNICATIONS COMMISSION

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

29 MAR 1994

John F. Garziglia, Esquire
Louise Cybulski, Esquire
Pepper & Corazzini
200 Montgomery Building
1776 K Street, N.W.
Washington, D.C. 20006

Re: The Cromwell Group, of Illinois
File No. BPH-920806ME
For a new FM station at
Maroa, Illinois
Fee Control # 9301078170412002

Dear Mr. Garziglia and Ms. Cybulski:

This is in response to your request for refund of the fee submitted in the above-referenced matter.

Your request is granted. We have reviewed the facts surrounding your filing and have concluded that a refund is warranted pursuant to Section 1.1111 of the Commission's rules. 47 C.F.R. § 1.1111. The subsection checked below is specifically applicable to your request.

____ No fee is required for the above referenced submission (§1.1111(a)(1)).

____ An insufficient fee has been submitted with the application/filing (§1.1111(a)(2)).

____ The applicant cannot fulfil the prescribed age requirement (§1.1111(a)(3)).

____ The Commission has adopted a new rule that has nullified the application after its acceptance for filing (§1.1111(a)(4)).

____ A new law or treaty has rendered useless a grant or other positive disposition of the application (§1.1111(a)(4)).

____ The application was not timely filed in accordance with the filing window as established by the Commission (§1.1111(6)).

____ In the case of a broadcast applicant, the application was granted without being designated for hearing (§1.1111(b)(1)).

__X__ In the case of a broadcast applicant, the application was dismissed prior to designation for hearing or in the order designating the case for hearing (§1.1111(b)(2)).

____ In the case of a broadcast applicant, the application was dismissed for failure to file a Notice of Appearance (§1.1111(b)(2)).

____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding to file a Notice of Appearance and the application was immediately grantable (§1.1111(b)(3)).

____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding who filed a Notice of Appearance and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)(3)).

____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for the dismissal of all but the above-referenced application, and the application was immediately grantable (§1.1111(b)(4)).

____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for dismissal of all but the above-referenced application and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)(4)).

A check, made payable to maker of the original check and drawn in the amount of $6,760.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

APR 1 8 1994

Mr. Winston E. Fields
DeSoto Broadcasting Corp.
616 Arcadia Courts
Center, Texas 75935

Re: DeSoto Broadcasting Corporation
New FM Station on Channel 284C3
Mansfield, Louisiana
Fee Control # 9209118170382001

Dear Mr. Fields:

This is in response to your request for refund of the fee submitted in the above-referenced matter.

Your request is granted. We have reviewed the facts surrounding your filing and have concluded that a refund is warranted pursuant to Section 1.1111 of the Commission's rules. 47 C.F.R. §1.1111. The subsection checked below is specifically applicable to your request.

_____ No fee is required for the above referenced submission (§1.1111(a)(1)).

_____ An insufficient fee has been submitted with the application/filing (§1.1111(a)(2)).

_____ The applicant cannot fulfill the prescribed age requirement (§1.1111(a)(4)).

_____ The Commission has adopted a new rule that has nullified the application after its acceptance for filing (§1.1111(a)(4)).

_____ A new law or treaty has rendered useless a grant or other positive disposition of the application (§1.1111(a)(4)).

_____ The application was not timely filed in accordance with the filing window as established by the Commission (§1.1111(a)(6)).

_____ In the case of a broadcast applicant, the application was granted without being designated for hearing (§1.1111(b)(1)).

_____ In the case of a broadcast applicant, the application was dismissed prior to designation for hearing or in the order designating the case for hearing (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the application was dismissed for failure to file a Notice of Appearance (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding to file a Notice of Appearance and the application was immediately grantable (§1.1111(b)(3)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding who filed a Notice of Appearance and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)).

__X__ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for the dismissal of all but the above-referenced application, and the application was immediately grantable (§1.1111(b)(4)).

_____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for dismissal of all but the above-referenced application and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)(4)).

A check, made payable to the maker of the original check and drawn in the amount of $6,760, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

APR 15 1994

Mr. Roy E. Henderson
P.O. Box 590209
Houston, Texas 77259-0209

Re: Radio Station KMPQ(AM)
Rosenberg-Richmond, Texas
Fee Control # 9108098170302001

Dear Mr. Henderson:

This is in response to your request for refund of the fee submitted in the above-referenced matter.

Your request is granted. We have reviewed the facts surrounding your filing and have concluded that a refund is warranted pursuant to Section 1.1111 of the Commission's rules. 47 C.F.R. §1.1111. The subsection checked below is specifically applicable to your request.

_____ No fee is required for the above referenced submission (§1.1111(a)(1)).

_____ An insufficient fee has been submitted with the application/filing (§1.1111(a)(2)).

_____ The applicant cannot fulfill the prescribed age requirement (§1.1111(a)(4)).

_____ The Commission has adopted a new rule that has nullified the application after its acceptance for filing (§1.1111(a)(4)).

_____ A new law or treaty has rendered useless a grant or other positive disposition of the application (§1.1111(a)(4)).

_____ The application was not timely filed in accordance with the filing window as established by the Commission (§1.1111(a)(6)).

__X__ In the case of a broadcast applicant, the application was granted without being designated for hearing (§1.1111(b)(1)).

_____ In the case of a broadcast applicant, the application was dismissed prior to designation for hearing or in the order designating the case for hearing (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the application was dismissed for failure to file a Notice of Appearance (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding to file a Notice of Appearance and the application was immediately grantable (§1.1111(b)(3)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding who filed a Notice of Appearance and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)).

_____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for the dismissal of all but the above-referenced application, and the application was immediately grantable (§1.1111(b)(4)).

_____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for dismissal of all but the above-referenced application and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)(4)).

A check, made payable to the maker of the original check and drawn in the amount of $6,760, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

James F. Rogers, Esquire
Latham & Watkins
1001 Pennsylvania Avenue, N.W.
Suite 1300
Washington, D.C. 20004-2505

Dear Mr. Rogers:

This is in response to your request for a partial waiver of the fee submitted by Hughes Communications Galaxy, Inc. (Hughes) in connection with its applications for a construction permit and to launch and operate a satellite.

You state that Hughes filed the instant applications and fee payments, totalling $72,030.00, in order to obtain the necessary authorizations to construct, launch and operate a satellite to replace an earlier authorized satellite which was destroyed during its launch because of a malfunction. The requisite application fee for a construction permit for the satellite is $2,030.00 and for the application for launch and operational authority is $70,000.00. However, you ask for an adjustment of Hughes' fee requirement to $500.00 and a refund of the remaining $71,530.00 submitted to the Commission.

You contend that the authorizations now requested by Hughes for its replacement satellite are identical in all respects with those which the Commission initially granted Hughes for its destroyed satellite, except that new construction and launch dates must be assigned. Moreover, the replacement satellite will be technically and operationally indistinguishable from its predecessor, and its orbital location will be unchanged. Consequently, the only Commission action required is the approval of new "milestone" dates, similar to the action requested by an application for an extension of a launch date. Finally, you state that the requested authorizations do not raise new issues of policy since any issue relating to the applications now before the Commission has already been resolved in the earlier proceedings. Therefore, in your view, Hughes' combined applications covering the replacement satellite constitute no more than a request for an extension of a satellite's launch date.

We are aware that the fees submitted by Hughes to cover its applications for its replacement satellite are substantial, and that Congress has granted the Commission narrow authority to waive or reduce the fees prescribed by the Fee Schedule. Further, we note that each fee contained in the Fee Schedule represents a congressional judgment on the appropriate fee for the matter in question. As such, there will frequently be individual cases where

the cost burden on the Commission's processes will be more or less than the required fee. For example, it is not unusual that an applicant withdraws before substantive processing of its application begins. In these instances, the Commission, except in the most compelling circumstances, retains the fee payment in its entirety.

In the case of Hughes, we recognize that the fees contained in the Fee Schedule bear scant relationship to the resources required to process the replacement satellite's authorizations because much of the processing is insignificantly different from that required for Hughes' initial satellite. However, the fee that Hughes suggests as adequate to cover both its applications relates only to an extension of time to construct or launch a satellite. Inasmuch as the processing of its application for construction, launch and operational authority is consistent with the processing burden for an application to modify a space station authorization, we will assess the fee required by the Schedule of Fees for a modification of a space station authorization. Thus, Hughes will be assessed a fee in the amount of $5,000.00.

Accordingly, for good cause shown, your request is granted to the extent specifically indicated above. We will assess Hughes with a total fee of $5,000.00 to cover its applications to construct, launch and operate its replacement satellite. Therefore, Hughes is entitled to a refund of $67,030.00. A check, made payable to the maker of the original check and drawn in the amount of $67,030.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

18 APR 1994

Donald E. Martin, Esq.
2000 L Street, N.W., Suite 200
Washington, D.C. 20036

Re: Lynn Ketelsen
File No. BPH-920604MD
Fee Control # 9211028170398005

Dear Mr. Martin:

This is in response to your request for refund of the fee submitted in the above-referenced matter.

Your request is granted. We have reviewed the facts surrounding your filing and have concluded that a refund is warranted pursuant to Section 1.1111 of the Commission's rules. 47 C.F.R. §1.1111. The subsection checked below is specifically applicable to your request.

_____ No fee is required for the above referenced submission (§1.1111(a)(1)).

_____ An insufficient fee has been submitted with the application/filing (§1.1111(a)(2)).

_____ The applicant cannot fulfill the prescribed age requirement (§1.1111(a)(4)).

_____ The Commission has adopted a new rule that has nullified the application after its acceptance for filing (§1.1111(a)(4)).

_____ A new law or treaty has rendered useless a grant or other positive disposition of the application (§1.1111(a)(4)).

_____ The application was not timely filed in accordance with the filing window as established by the Commission (§1.1111(a)(6)).

_____ In the case of a broadcast applicant, the application was granted without being designated for hearing (§1.1111(b)(1)).

_____ In the case of a broadcast applicant, the application was dismissed prior to designation for hearing or in the order designating the case for hearing (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the application was dismissed for failure to file a Notice of Appearance (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding to file a Notice of Appearance and the application was immediately grantable (§1.1111(b)(3)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding who filed a Notice of Appearance and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)).

__X__ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for the dismissal of all but the above-referenced application, and the application was immediately grantable (§1.1111(b)(4)).

_____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for dismissal of all but the above-referenced application and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)(4)).

A check, made payable to the maker of the original check and drawn in the amount of $6,760, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

21 APR 1994

Timothy K. Brady, Esq.
7113 Peach Ct., Suite 208
P.O. Box 986
Brentwood, Tennessee 37027-0986

Re: New Horizons Broadcasting Partnership
New FM Station
Whitesboro, New York
Fee Control # 9211238170402002

Dear Mr. Brady:

This is in response to your request for refund of the fee submitted in the above-referenced matter.

Your request is granted. We have reviewed the facts surrounding your filing and have concluded that a refund is warranted pursuant to Section 1.1111 of the Commission's rules. 47 C.F.R. §1.1111. The subsection checked below is specifically applicable to your request.

_____ No fee is required for the above referenced submission (§1.1111(a)(1)).

_____ An insufficient fee has been submitted with the application/filing (§1.1111(a)(2)).

_____ The applicant cannot fulfill the prescribed age requirement (§1.1111(a)(4)).

_____ The Commission has adopted a new rule that has nullified the application after its acceptance for filing (§1.1111(a)(4)).

_____ A new law or treaty has rendered useless a grant or other positive disposition of the application (§1.1111(a)(4)).

_____ The application was not timely filed in accordance with the filing window as established by the Commission (§1.1111(a)(6)).

_____ In the case of a broadcast applicant, the application was granted without being designated for hearing (§1.1111(b)(1)).

_____ In the case of a broadcast applicant, the application was dismissed prior to designation for hearing or in the order designating the case for hearing (§1.1111(b)(2)).

__X__ In the case of a broadcast applicant, the application was dismissed for failure to file a Notice of Appearance (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding to file a Notice of Appearance and the application was immediately grantable (§1.1111(b)(3)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding who filed a Notice of Appearance and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)).

_____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for the dismissal of all but the above-referenced application, and the application was immediately grantable (§1.1111(b)(4)).

_____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for dismissal of all but the above-referenced application and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)(4)).

A check, made payable to the maker of the original check and drawn in the amount of $6,760, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

Mr. William C. O'Donnell, President
ODON Communications Group I
Limited Partnership
1413 S. Commercial Street
Neenah, Wisconsin 54956

Re: ODON Communications Group I
Limited Partnership
Allouez, Wisconsin
Fee Control # 9401078170055001

Dear Mr. O'Donnell:

This is in response to your request for refund of the fee submitted in the above-referenced matter.

Your request is granted. We have reviewed the facts surrounding your filing and have concluded that a refund is warranted pursuant to Section 1.1111 of the Commission's rules. 47 C.F.R. §1.1111. The subsection checked below is specifically applicable to your request.

_____ No fee is required for the above referenced submission (§1.1111(a)(1)).

_____ An insufficient fee has been submitted with the application/filing (§1.1111(a)(2)).

_____ The applicant cannot fulfill the prescribed age requirement (§1.1111(a)(4)).

_____ The Commission has adopted a new rule that has nullified the application after its acceptance for filing (§1.1111(a)(4)).

_____ A new law or treaty has rendered useless a grant or other positive disposition of the application (§1.1111(a)(4)).

_____ The application was not timely filed in accordance with the filing window as established by the Commission (§1.1111(a)(6)).

_____ In the case of a broadcast applicant, the application was granted without being designated for hearing (§1.1111(b)(1)).

___X___ In the case of a broadcast applicant, the application was dismissed prior to designation for hearing or in the order designating the case for hearing (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the application was dismissed for failure to file a Notice of Appearance (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding to file a Notice of Appearance and the application was immediately grantable (§1.1111(b)(3)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding who filed a Notice of Appearance and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)).

_____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for the dismissal of all but the above-referenced application, and the application was immediately grantable (§1.1111(b)(4)).

_____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for dismissal of all but the above-referenced application and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)(4)).

A check, made payable to the maker of the original check and drawn in the amount of $6,760, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

Shelley Sadowsky, Esq.
Rosenman & Colin
1300 19th Street, N.W.
Washington, D.C. 20036

Re: Mr. Mark Rollings
File No. BPH-920805MB
Channel 297A, Maroa, IL
Fee Control # 9301078170411001

Dear Ms. Sadowsky:

This is in response to your request for refund of the fee submitted in the above-referenced matter.

Your request is granted. We have reviewed the facts surrounding your filing and have concluded that a refund is warranted pursuant to Section 1.1111 of the Commission's rules. 47 C.F.R. §1.1111. The subsection checked below is specifically applicable to your request.

_____ No fee is required for the above referenced submission (§1.1111(a)(1)).

_____ An insufficient fee has been submitted with the application/filing (§1.1111(a)(2)).

_____ The applicant cannot fulfill the prescribed age requirement (§1.1111(a)(4)).

_____ The Commission has adopted a new rule that has nullified the application after its acceptance for filing (§1.1111(a)(4)).

_____ A new law or treaty has rendered useless a grant or other positive disposition of the application (§1.1111(a)(4)).

_____ The application was not timely filed in accordance with the filing window as established by the Commission (§1.1111(a)(6)).

_____ In the case of a broadcast applicant, the application was granted without being designated for hearing (§1.1111(b)(1)).

___X___ In the case of a broadcast applicant, the application was dismissed prior to designation for hearing or in the order designating the case for hearing (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the application was dismissed for failure to file a Notice of Appearance (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding to file a Notice of Appearance and the application was immediately grantable (§1.1111(b)(3)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding who filed a Notice of Appearance and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)).

_____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for the dismissal of all but the above-referenced application, and the application was immediately grantable (§1.1111(b)(4)).

_____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for dismissal of all but the above-referenced application and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)(4)).

A check, made payable to the maker of the original check and drawn in the amount of $6,760, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

APR 1 1 1994

Mr. Lawrence F. Gilberti
President
Sky-Highway Radio Corp.
1001 22nd Street, N.W.
Washington, D.C. 20037

Dear Mr. Gilberti:

This is in response to your request for a refund of the fee payments, totaling $144,060.00, submitted by Sky-Highway Radio Corp. (Sky-Highway) with its proposed digital audio radio service satellite (DARS) system. You state that Sky-Highway filed applications to construct two satellites together with the required $4,060.00 fee payment. Subsequently, Sky-Highway filed an additional $140,000.00 with its applications for launch and operational authority for the two satellites.

You indicate that Sky-Highway's fee payments should be returned because the Commission's fee program is intended to recover only its costs. You contend that the Commission incurred little or no cost in processing Sky-Highway's applications because it voluntarily withdrew the applications before they became subject to any substantive review. Moreover, you state that the Commission has not established rules governing the proposed new DARS service. Further, Sky-Highway withdrew its construction permit applications shortly after they were accepted for filing and before completion of the pleading cycle established for these applications, and also withdrew its applications for launch and operational authority before they were the subject of a public notice or of any substantive scrutiny by the staff.

You suggest that Sky-Highway's application fees should be treated in the same manner as fees are treated in the broadcast services when mutually exclusive applications are filed. There, the Commission's rules provide for the return of a mutually exclusive applicant's hearing fee whenever that applicant voluntarily withdraws its application before the competing applications are designated for a comparative hearing. In sum, you ask for a refund of Sky-Highway's application fees in their entirety since, in your view, little or no processing costs have been incurred and ample Commission precedent exists in the broadcast services to warrant the refund.

Initially, we cannot find that a refund to Sky-Highway is warranted based on the Commission's rules relating to broadcast applicants since the Commission retains application fees in the broadcast services no matter when a mutually exclusive applicant withdraws. Nonetheless, we are aware that the fees submitted by

Sky-Highway are substantial and that Congress has granted to the Commission narrow authority to waive or reduce its fees when the public interest warrants. We are also cognizant that the fees submitted bear scant relationship to the resources that the Commission has expended to date on the processing of these applications. We note that each fee as contained in the Fee Schedule represents a congressional judgment in the matter. Consequently, there will frequently be individual cases where the cost of the Commission's processes will be more or less than the required fee. For example, it is not unusual that an applicant withdraws before substantive processing of its application begins. In these instances, the Commission, except in the most compelling circumstances, retains the fee in its entirety.

In the case at hand, we cannot find that Sky-Highway's withdrawal of its construction permit applications entitles it to relief that would be denied to applicants in other services who withdraw their applications shortly after filing. However, we are persuaded that the fees submitted by Sky-Highway for obtaining launch and operational authority are unduly excessive. Any processing of these latter applications will in all likelihood be deferred until the adoption of rules governing the DARS service. Moreover, no processing of Sky-Highway's applications for launch and operational authority can occur prior to completion of the substantive processing on the underlying applications for construction permits. Here, we are mindful that Sky-Highway's construction permit applications were in a preliminary processing stage at the time it withdrew. Therefore, we find that refund of the fees that Sky-Highway submitted with its applications for launch and operational authority is warranted for good cause shown.

Accordingly, your request is granted to the extent indicated above. A check, made payable to the maker of the original check and drawn in the amount of $140,000.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

MAR 2 9 1994

John S. Neely, Esquire
Miller & Miller, P.C
1990 M Street, N.W.
Suite 760
Washington, D.C. 20036

Re: Robert Dale Spilman
File No. BPH-920514MI
For a new FM station at
Detroit Lakes, Minnesota

Dear Mr. Neely:

This is in response to your request for refund of the fee submitted in the above-referenced matter.

Your request is granted. We have reviewed the facts surrounding your filing and have concluded that a refund is warranted pursuant to Section 1.1111 of the Commission's rules. 47 C.F.R. § 1.1111. The subsection checked below is specifically applicable to your request.

____ No fee is required for the above referenced submission (§1.1111(a)(1)).

____ An insufficient fee has been submitted with the application/filing (§1.1111(a)(2)).

____ The applicant cannot fulfil the prescribed age requirement (§1.1111(a)(3)).

____ The Commission has adopted a new rule that has nullified the application after its acceptance for filing (§1.1111(a)(4)).

____ A new law or treaty has rendered useless a grant or other positive disposition of the application (§1.1111(a)(4)).

____ The application was not timely filed in accordance with the filing window as established by the Commission (§1.1111(6)).

__X__ In the case of a broadcast applicant, the application was granted without being designated for hearing (§1.1111(b)(1)).

____ In the case of a broadcast applicant, the application was dismissed prior to designation for hearing or in the order designating the case for hearing (§1.1111(b)(2)).

____ In the case of a broadcast applicant, the application was dismissed for failure to file a Notice of Appearance (§1.1111(b)(2)).

____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding to file a Notice of Appearance and the application was immediately grantable (§1.1111(b)(3)).

____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding who filed a Notice of Appearance and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)(3)).

____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for the dismissal of all but the above-referenced application, and the application was immediately grantable (§1.1111(b)(4)).

____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for dismissal of all but the above-referenced application and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)(4)).

A check, made payable to maker of the original check and drawn in the amount of $6,760.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

for Thomas H. Hallerman

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

29-MAR 1994

Mr. Douglas L. Vernier
Director, Broadcasting Services
and Licensee Official
Communication Arts Center
University of Northern Iowa
Cedar Falls, Iowa 50614-0359

Dear Mr. Vernier:

This is in response to your request for refund of the fee submitted by the University of Northern Iowa (Northern Iowa) in connection with its application for license to cover a transportable satellite earth station.

The Commission has recognized that Northern Iowa is exempt from the payment of any application fees due to its status as a governmental entity, pursuant to section 1.1112(f) of the Commission's rules, 47 C.F.R. § 1.1112(f). See letter to Mr. Douglas L. Vernier from Marilyn J. McDermett, Associate Managing Director for Operations, dated March 1, 1994.

Accordingly, your request is granted. A check, drawn in the amount of $1,525.00 and made payable to the maker of the original check, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

MAR 25 1994

Henry Goldberg, Esquire
Goldberg, Godles, Wiener & Wright
1229 Nineteenth Street, N.W.
Washington, D.C. 20036

Dear Mr. Goldberg:

This is in response to the request for waiver, filed by Volunteers in Technical Assistance (VITA), of the filing fees required with its application for authority to launch and operate and its application to construct an international non-profit, low earth orbit satellite (LEO) system.

VITA is a tax-exempt organization which plans to construct and operate three space craft in the fixed-satellite service for the provision of international education, health, environmental, disaster relief, and technical assistance communications.

VITA has requested the waivers because it will provide its services on a non-profit basis. Previously, the Commission declined to grant VITA's waiver requests because it believed that grant of the requests were beyond its authority since "Congress did not establish a general waiver for non-profit entities, except for non-profit applicants in the special emergency radio and public safety radio services." See letter to Henry R. Norman, Esquire from Marilyn J. McDermett, Associate Managing Director for Operations, dated November 19, 1991; see also letter to Henry R. Norman, Esquire from Andrew S. Fishel, Managing Director, dated March 11, 1992.

However, Congress recently had occasion to clarify that requests for fee waivers by "non-profit entities which qualify for tax exempt status, and which seek to use the new cost-efficient technology of ultra-light, non-geostationary satellite systems to advance a public interest" should be considered within the scope of the Commission's waiver authority. See Conference Report on H.R. 2519 (H.R. Rep. No. 103-293), 103d Cong., 1st Sess. (1993).

As a consequence, we are now satisfied that VITA's request for waiver is properly before the Commission for consideration. Therefore, based on the purposes for which VITA will operate its system, its non-profit status and its representation that "its services will be provided on a strictly non-profit basis for the benefit of recipients in developing countries," we find that grant

of VITA's requests are in the public interest. See Request for Waiver of Filing Fees, p.3, filed September 21, 1990.

Accordingly, VITA's requests for waiver are granted.

Sincerely,

Andrew S. Fishel
Managing Director

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

29 MAR 1994

Vincent J. Curtis, Jr., Esq.
Fletcher, Heald & Hildreth
1300 North 17th Street
11th Floor
Rosslyn, Virginia 22209

Re: Patrick G. Walters
Stillwater, Oklahoma
BPH-930715ME
File Control # 9401078170056001

Dear Mr. Curtis:

This is in response to your request for refund of the fee submitted in the above-referenced matter.

Your request is granted. We have reviewed the facts surrounding your filing and have concluded that a refund is warranted pursuant to Section 1.1111 of the Commission's rules. 47 C.F.R. § 1.1111. The subsection checked below is specifically applicable to your request.

____ No fee is required for the above referenced submission (§1.1111(a)(1)).

____ An insufficient fee has been submitted with the application/filing (§1.1111(a)(2)).

____ The applicant cannot fulfil the prescribed age requirement (§1.1111(a)(3)).

____ The Commission has adopted a new rule that has nullified the application after its acceptance for filing (§1.1111(a)(4)).

____ A new law or treaty has rendered useless a grant or other positive disposition of the application (§1.1111(a)(4)).

____ The application was not timely filed in accordance with the filing window as established by the Commission (§1.1111(6)).

__x__ In the case of a broadcast applicant, the application was granted without being designated for hearing (§1.1111(b)(1)).

____ In the case of a broadcast applicant, the application was dismissed prior to designation for hearing or in the order designating the case for hearing (§1.1111(b)(2)).

____ In the case of a broadcast applicant, the application was dismissed for failure to file a Notice of Appearance (§1.1111(b)(2)).

____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding to file a Notice of Appearance and the application was immediately grantable (§1.1111(b)(3)).

____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding who filed a Notice of Appearance and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)(3)).

____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for the dismissal of all but the above-referenced application, and the application was immediately grantable (§1.1111(b)(4)).

____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for dismissal of all but the above-referenced application and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)(4)).

A check, made payable to maker of the original check and drawn in the amount of $6,760, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Thomas M Hallman for

Marilyn J. McDermett
Associate Managing Director
for Operations

*U.S. Government Printing Office: 1994 — 300-842/00018